90-1222

No. ———

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
MILDRED WILLIAMS, *et al.*,
Respondents.

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
ANTOINETTE SECARD, *et al.*,
Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal, Second District, Div. 3

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Is a forum selection clause in a passenger ticket contract for an ocean voyage enforceable under federal maritime law?

LIST OF PARTIES

Petitioner is Carnival Cruise Lines Inc. There is no parent company or subsidiary (other than wholly owned subsidiaries) to be listed pursuant to Rule 29.1.

Respondents are the Superior Court of the State of California for the County of Los Angeles, and, in the *Williams* action, the following two hundred thirty-eight plaintiffs:

Mildred Williams
Amy Barta
Nancy Benton
Don Benton
Mary Benton
Rich Backman
Knesta Backman
Marjory B. Bailey
J. Lynn Baker
Duane Baker
Richard Bales
Cindi Bales
Inez Barnett
Cindy Barnett-Levy
Amy Barta
Lily Bash
Juanita Teresa Beardow
Daren Berkett
Ken D. Beto
Dayma Bold
Ella Brocksieper
Jane Buckingham
Bill Buckingham
Dave Burris
Peter Bussee
Donna Bussee
Peter and Donna Bussee
as Guardians ad Litem for
Trish Bussee, a minor;
and Steve Bussee, a minor
Vera Butler
Judd Carder
Jayne Cohen
Phillip Cohen
Robin Chow
George Chow
Robin Chow and George Chow
as Guardians ad Litem for
Christopher George Chow,
a minor; and
Jaime Rochelle Chow,
a minor
Irene Conroy
Ed Conroy
Raymond Costales
Mary Ann Costales
Alberta Crawford
June Curtis
Jim Cusak
Arion Cusak
Clifford Dalton
Donna Dalton
Clifford Dalton and
Donna Dalton as
Guardians ad Litem for
Jason A. Dalton, a minor
Joanne D'Orazi
Rick D'Orazi
Thomas D'Orazi
Theodora D'Orazi

Arlene Delehart
Kelly Der Harootunia
Michael Dillon
Kris Dillon
Patricia Dolan
Jack Eva
Janet Eva
George Fischer
Patricia Fischer
Glenn Federowich
Cindy Federowich
Teresa Felski
Frances Fishman
Gilbert Flores
Lola I. Flores
Richard Foley
Lisa Gallagher
Jim Gausch
Charlene Gausch
Philip T. George
Martha J. George
Darlene Gibson
Dianna Gilbert
David Golchehreh
Suzanne Golchehreh
David Golchehreh and Suzanne Golchehreh as Guardians ad Litem for Leila Golchehreh a minor; and Lawdan Golchehreh, a minor
Bernice Goldrup
Leon E. Grossman
Wando J. Grossman
Frankie Halford
Less Halford
James Hammerstone
Lana Hammerstone
Sigrid Hann
Marvis Haro
Barbara Heide
Lewis Heide
Georgia Herr
Vivian E. Hall
Carolyn Hongola
Mary Hurst
Barbara Jeffries
Ray Jeffries
Dale B. Johnsen
Elizabeth Johnsen
Connie Juarez
Mathew Kearney
Alice Kearney
Phyllis Keene
John Keene
Patricia A. Kendrew
Kenneth Kessler
Bessie Kessler
Julie Klenner
John H. Konte, III
Marilyn Koper
Connie Kramer
Ira Kramer
Norbert F. Kroeger
Arleen E. Kroeger
David Kuba
Jill Kuba
Tom Langusch
Rose Lantz
Tom Laster
Paul Leeder
Mary Jo Leeder
Leanne Leeder
R. L. Lehman
Lois Lehman
Linda Leveque
Jerry Lindan
Anthony Lore
Sherry Lore
Dean Mack
Vickie Mack
Jose Maldonado

Carmen Maldonado
Sadie McPhee
Clarence Mitchell
Betty Mitchell
Wallace Mitchell
Almina Mitchell
Jeffrey Moore
Essie Moore
George Munson
Margaret Munson
Thomas P. Murphy
Sharon J. Myers
Robert Myers
Arlene Myers
Ray Nicol
Christine Nicol
Peter Nitoglia
Melissa Nitoglia
Edward Odian
Diane Odian
Dale Osterbuhr
Edith Osterbuhr
Duane W. Owens
Charles Packett
Betty K. Pearce
Harold Pennington
Pauline Pennington
John Peters
Margie Peters
Cecilia Peterson
Donald Peterson
Virginia Peterson
Larry Pfost
Pat Pfost
Blanche Protz
Mel Provencio
Rachel F. Provencio
Arthur Provost
Pat Quintrell
Ed Quintrell
Alexander M. Reeves
Elizabeth Reinholdt
Peter Ressler
Vanessa Ressler
Robert Reynolds
Carole Reynolds
Vivian Risner
Joseph Saba
Annette Saba
Robert Rowe
Julie Ann Rowe
Roberta N. Rowlands
Harriet Schindele
Deanna K. Schmidt
David Schneer
Kathleen Schneer
Ann Schroeder
Charles Schroeder
Patrick M. Shea
Linda Sheehy
John Sims
Cindi Sims
Ella Smethurst
Geoffry S. Smith
Jean Smith
John Sobieski
Mildren E. Sobieski
Roderick Sparks
Teresita Sparks
Ernest H. Sprague
Lynne Spuhler
Edward Stauber
Max Steinberg
Roslyn Sternfeld
Wendy Strickler
Donna Strickler
Dean Sybrant
Eileen Sybrant
Robert Sybrant
Nadeane Thomas
Cliff Tipping
Dorothy Tipping

Leonard M. Tolvo
John Torrey
Jeanette Torrey
Dan Tyransky
Ellen Tyransky
Mary Van Barneveld
Harry Venger
Ethel Venger
Harry Vento
Rita Vento
Elizabeth Vots
Verne Pennell
Rhonda Voci
Lillian Voss
Robert E. Waterman, Jr.
Steve Watson
Shirley Watson
Natalie Weill
Irving Weill
Frankie Welcome
Les Wetherbee
Shirley Wigge
Gerda Wohlau
Fred Wohlau
Mark Wright
Eileen Wright
Dorothy Wright
Claude Wright

The six additional respondents in the *Secard* action are:

Antoinette Secard, Ed Secard, Fred Secard, George Secard, Joan K. Secard, and Diana J. Fowler.

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PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The order of the California Supreme Court dated November 15, 1990 summarily denying Carnival Cruise Lines Inc.'s petition for review is not reported and is reproduced at page 11a of the Appendix to this Petition. The opinion of the California Court of Appeal (Second District, Division 3), dated August 21, 1990, is reported

at 222 Cal.App.3d 1548 and at 272 Cal.Rptr. 515 and reproduced at Pet. App. 1a-10a. The orders of the California Superior Court are not reported but a transcript of the court's comments is reproduced at Pet. App. 14a-16a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257 to review the decision of the California Court of Appeal since it decides the enforcement of a maritime contract [1] under federal maritime law,[2] and since the California Supreme Court summarily denied Carnival's petition for review by order dated November 15, 1990.[3]

The decision of the California Court of Appeal is "final" notwithstanding that further proceedings, including trials, are yet to come in the lower state courts, because petitioner's request for enforcement of the forum selection clause presents an issue on which later review cannot be had since "the governing state law would not permit [Carnival] again to present [its] federal claims for review." *Cox Broadcasting Corp., et al. v. Cohn*, 420 U.S. 469, 481 (1975).[4] California procedural law, which governs these cases, does not permit a party to preserve the issue of enforcement of a contractual forum selection

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[1] A passenger ticket for an ocean voyage is a maritime contract. *The Moses Taylor*, 71 U.S. (4 Wall.) 411, 427 (1866).

[2] A state court is bound to and in this case did apply federal maritime law, and its rulings on admiralty issues are reviewable by petition for a writ of certiorari. *Garrett v. Moore-McCormack Co., Inc.*, 317 U.S. 239, 244-46 (1942); *Doucette v. Vincent, et al.*, 194 F.2d 834, 841-43 (1st Cir. 1952).

[3] *Madruga v. Superior Court, etc.*, 346 U.S. 556, 557 n.1 (1954), and *Bandini Petroleum Co. v. Superior Court, etc., et al.*, 284 U.S. 8, 14 (1931).

[4] *See* particularly the third category discussed in *Cox* at 420 U.S. at 481.

clause for review on appeal after trial,[5] but instead requires a party to obtain review on such an issue only on an interlocutory basis.[6] The conclusion that this issue cannot be reviewed on appeal in California's courts distinguishes this case from *Lauro Lines S.R.L. v. Chasser, et al.*, 490 U.S. 495 (1989).[7]

STATUTES INVOLVED

This case involves California Code of Civil Procedure[8] sections 410.30, 418.10 and 904.1. These materials are reprinted at Pet. App. 19a-22a.

STATEMENT OF THE CASE

This single petition[9] addresses two separate lawsuits brought in the same court of the State of California by two hundred forty-four passengers against a nonresident operator of cruise vessels. The passengers allege they

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[5] "The right of appeal [in California] is wholly statutory and no judgment or order is appealable unless expressly authorized by the [state] constitution or statute." *Hennigan v. Boren* (1966) 243 Cal.App.2d 810, 815, 52 Cal.Rptr. 748, 752 (cites omitted). Cal. Code of Civil Procedure § 904.1 is the California statute which identifies "appealable judgments and orders" from the Superior courts. Its subsection (c) expressly permits a party the right to *appeal* only "[f]rom an order *granting* a motion to . . . stay or dismiss the action . . ." (emphasis added) and does not provide the right to appeal from an order *denying* the motion. § 904.1 is reproduced at Pet. App. 21a-22a.

[6] *See* California Code of Civil Procedure § 418.10(c), reproduced at Pet. App. 20a-21a.

[7] In *Lauro Lines* this Court held that it had no jurisdiction under 28 U.S.C. § 1291 to interlocutorily review the order of a federal district court denying a cruise company's motion to dismiss the action based on a contractual forum selection clause in a ticket for passage.

[8] Hereinafter referred to as "Cal. C.C.P."

[9] Rule 12.2 permits a single petition to address cases which involve identical or closely related questions.

suffered personal injuries and other damages onboard the M/V TROPICALE during a storm at sea.

At least eighty-five of the respondent passengers who took the seven-day round-trip cruise in January, 1988 from Los Angeles to various ports in Mexico are not resident in California, but reside in seventeen other states and Canada. Pet. App. 4a-5a. Petitioner is a Panamanian corporation with its principal place of business in Miami, Florida. Pet. App. 4a. It issued ticket contracts to the respondents which included the following forum selection clause:

> It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country. Pet. App. 4a.

On September 15 and 25, 1989, petitioner, as a specially appearing defendant, moved the Superior Court to stay or dismiss the two lawsuits on the ground that the contractual forum selection clause in each respondent's ticket was valid under the applicable federal martime law. On April 12, 1990, the Superior Court denied petitioner's motions. Pet. App. 7a, 14a-16a. On May 16 and 22, 1990, Carnival petitioned the California Court of Appeal for writs of mandate directing the Superior Court to vacate its orders of April 12, 1990 in the two lawsuits, and to enter orders enforcing the contractual forum selection clause in the tickets. Carnival sought such interlocutory review under California procedural law,[10] which

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[10] *See* Cal. C.C.P. § 418.10(c), reproduced at Pet. App. 20a-21a.

See also Furda v. Superior Court, etc. (1984), 161 Cal.App.2d 418, 207 Cal.Rptr. 646, which held that "[t]he enforceability of a forum selection clause is properly raised by a motion to stay or dismiss under Code of Civil Procedure Section 410.30 * * * and entitles the moving party to the procedural benefits of Civil Procedure Sec-

expressly sets forth the procedure to obtain review of a denial of a motion to stay or dismiss the action.

On June 22, 1990, the California Court of Appeal issued alternative writs of mandate in the two cases and consolidated them for decision. After briefing by the petitioner and respondents (no appearance was made by the Superior Court), the California Court of Appeal issued its opinion on August 21, 1990, denying the petitions for writs of mandate and discharging the alternative writs. Pet. App. 1a-10a. The California Court of Appeal applied federal maritime law in arriving at its decision.

On October 1, 1990 petitioner filed its petition with the California Supreme Court for review of the August 21, 1990 opinion of the California Court of Appeal. This petition was summarily denied on November 15, 1990. Pet. App. 11a. On January 22, 1991, this Court stayed all proceedings in the courts below.[11]

REASONS FOR GRANTING THE WRIT

I. THIS COURT HAS GRANTED CARNIVAL'S PETITION FOR CERTIORARI IN *SHUTE* (NO. 89-1647) WHICH PRESENTS THE IDENTICAL ISSUE.

This case presents the question of whether and when a forum selection clause in a passenger ticket contract can be enforced to require dismissal or stay of an action brought in a forum other than the one specified in the contract.

On October 1, 1990, this Court granted Carnival's petition for certiorari in *Carnival Cruise Lines, Inc. v. Shute, et al.* (No. 89-1647). Oral argument was had on January 15, 1991. *Shute* presents the identical issue of

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tion 418.10 (. . . right to review of an order of denial on mandamus)". *Id.*, 161 Cal.App.3d at 425, 207 Cal.Rptr. at 650.

[11] The text of the Court's order is reproduced as Pet. 12a-13a.

law for decision, namely the enforceability under federal maritime law of a forum selection clause in a passenger ticket contract for an ocean voyage. The California Court of Appeal expressly followed the Ninth Circuit's opinion in *Shute, et al. v. Carnival Cruise Lines, Inc.*, 897 F.2d 377 (9th Cir. 1990). Carnival therefore requests that the Court hold this petition pending its decision in *Shute*. If the Court then resolves the forum selection issue in a way that is inconsistent with the California Court of Appeal's approach, Carnival requests that its petition in this case be granted, the decision below vacated, and the case remanded. Alternatively, the Court may find it desirable in reaching its decision on this issue in *Shute* to consider also the factual record of this case, which describes how a passenger can obtain and review the terms of the contract before purchasing the ticket.

If this Court should decide only the issue of *in personam* jurisdiction presented in *Shute* and not reach the forum selection issue, Carnival requests that this petition be granted for the following reasons.

II. THE COURT SHOULD RESOLVE A CONFLICT AMONG THE CIRCUITS AND STATE COURTS AS TO THE VALIDITY OF FORUM SELECTION CLAUSES IN PASSENGER TICKET CONTRACTS.

In *M/S BREMEN, et al. v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (*"The BREMEN"*) this Court most recently held, in a case involving an international commercial agreement, that admiralty law establishes a strong presumption in favor of enforcing a forum selection clause. The California Court of Appeal in this case correctly stated that the cruise ticket was governed by federal maritime law. Pet. App. 8a. It adopted the reasoning of *Shute, supra*, 897 F.2d 377 (9th Cir. 1990) which held that the test set forth by *The BREMEN* is controlling. *Id.* However, like the Ninth Circuit in *Shute*, the California Court of Appeal found that the pre-

sumption of validity of forum selection clauses mandated by *The BREMEN* was overcome on two grounds: first, the clause, as part of a pre-printed contract submitted to respondents on a "take-it-or-leave-it" basis did not represent the intent of the parties, and second, the inconvenience to some of the respondents of litigating the claim in Florida would effectively deprive them of their day in court. Pet. App. 10a.

In following *Shute*, the California Court of Appeal's opinion is in square conflict with the holding of the Third Circuit in *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione*, 858 F.2d 905 (3d Cir. 1988), *cert. dismissed*, 490 U.S. 1001 (1989).[12] Its approach to the enforcement of a term in a cruise ticket also conflicts with that of the First, Second, Third, Fourth, Fifth, and Sixth Circuits.

This Court should grant certiorari in this case to resolve the conflict between the circuits on this issue, which is regularly presented for decision in lawsuits involving travel.[13]

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[12] The decision of the California Court of Appeal is also in conflict with the decision of the Fourth Circuit in *Catalana v. Carnival Cruise Lines, Inc.*, 618 F.Supp. 18 (D.Md. 1984), *aff'd*, 806 F.2d 257 (4th Cir. 1986). In that case, the district court ruled that the forum selection clause in the passenger ticket was incorporated into the terms of the contract between the carrier and the passenger, and enforced the clause. The Fourth Circuit affirmed without issuing an opinion for publication.

[13] Numerous district courts have been confronted with the question of whether to enforce a forum selection clause in a passenger ticket contract. *See Everett v. Carnival Cruise Lines, Inc.*, 677 F.Supp. 269 (M.D.Pa. 1987); *Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F.Supp. 563 (S.D.N.Y. 1987); *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F.Supp. 318 (S.D. Tex. 1985); *Luby, et al. v. Carnival Cruise Lines, Inc.*, 1986 A.M.C. 2326 (D.Md. 1985). The clauses were enforced in all of these cases, and in *Walker v. Carnival Cruise Lines, Inc.*, 681 F.Supp. 470 (N.D.Ill. 1987), the court indicated it would enforce the clause unless the passenger "produces affidavits which convince us [enforcement] would be truly burden-

A. Federal Maritime Law Strongly Favors Enforcement of Forum-Selection Clauses.

In *The BREMEN*, the Court enforced a forum selection clause in a maritime contract for the towing of an oil drilling rig from Louisiana to the Adriatic Sea. After the rig was damaged at sea and taken to Tampa, Florida, the owner of the rig sued in federal court in Tampa instead of in the contractually designated forum of London. 407 U.S. at 3-4. Both lower courts rejected the defendant's motion to dismiss or stay based on the forum selection clause, holding that the defendant had not met its burden to show that London would be a more convenient forum than Tampa. *Id.* at 6-8.[14]

The Court reversed and held that "the forum selection clause should control absent a strong showing that it should be set aside." *Id.* at 15. The Court imposed the burden on the party opposing enforcement of the clause to "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching". *Id.* It specifically rejected the balance-of-convenience test employed by the lower courts to evaluate whether enforcement of the

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some . . . or otherwise unjust." *Id.* at 479. In the litigation leading to *Lauro Lines, supra,* 490 U.S. 495, the district court held that the forum selection clause was not enforceable. *See Klinghoffer, et al. v. Achille Lauro, et al.,* 1988 A.M.C. 636 (S.D.N.Y. 1987).

[14] The Court of Appeals also relied partly on the likelihood that the London court would enforce an exculpatory clause in the contract, relieving the defendant of liability in contravention of federal maritime law. *Id.* at 8 nn.2, 8. There is of course no issue as to choice of law in this case; since the allegedly negligent conduct of petitioner that respondents complain of qualifies as a maritime tort, federal maritime law will govern the respondents' claims whether brought in California or Florida. *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625 (1959). *See also Everett v. Carnival Cruise Lines, Inc.,* 912 F.2d 1355 (11th Cir. 1990), applying federal maritime law to a passenger case transferred from Pennsylvania to Florida pursuant to a forum selection clause in the ticket.

clause would have been reasonable, and found that the district court had wrongly burdened the party seeking enforcement of the clause to establish its validity. *Id.* at 18. The Court then remanded the case to allow the party challenging enforcement of the clause an

> opportunity to carry its heavy burden of showing not only that the balance of convenience is strongly in favor of [a non-contractual forum] . . . but also that . . . trial [in the contractual forum] will be so manifestly and gravely inconvenient . . . that it will be effectively deprived of a meaningful day in court. *Id.* at 19.

Although the parties in *The BREMEN* had specifically negotiated certain portions of their contract,[15] the Court noted that the standards it had set forth to determine enforceability of a forum selection clause applied even where certain facts "might suggest that the agreement was an adhesive one." *Id.* at 17.

B. The California Court of Appeal's (and *Shute's*) Approach Toward Enforceability of Provisions in a Cruise Ticket Contract Conflicts With That of the First, Second, Third, Fourth, Fifth, and Sixth Circuits.

Courts have regularly enforced clauses in cruise tickets even when the passenger did not specifically bargain for the particular clause, provided the terms of the ticket were reasonably communicated to the potential passenger. The First, Second, Third, Fourth, and Fifth Circuits have upheld clauses in tickets for passage on cruise ships as contractually binding terms.[16] These circuits have pre-

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[15] The party opposing the clause in *The BREMEN* filed an affidavit that "no specific negotiations concerning the forum clause took place." 407 U.S. at 13, n.14.

[16] *See Shankles, et al. v. Costa Armatori, S.P.A., et al.*, 722 F.2d 861 (1st Cir. 1983); *DeNicola v. Cunard Line Ltd.*, 642 F.2d 5 (1st Cir. 1981); *Spataro v. Kloster Cruise, Ltd., etc.*, 894 F.2d 44 (2d Cir. 1990); *Geller v. Holland-America Line*, 298 F.2d 618 (2d Cir.), *cert. denied*, 370 U.S. 909 (1962); *Hodes, supra*, 858 F.2d at 909-

sumed that the passenger impliedly consented to the terms of the contract if he or she had adequate notice of the ticket's terms and then used the ticket. To determine whether the ticket provided adequate notice to the passenger of its terms, these circuits focused on the physical characteristics of the ticket (e.g., type and size of lettering, color contrast, references on the face of the ticket to the terms on the following pages), and the language therein. If the provision was adequately incorporated and clear and unambiguous, it was enforced as part of the contract. The Sixth and other circuits have followed the same analytical approach when denying enforcement of particular clauses.[17]

Some circuits, such as the First Circuit (*see Shankles, supra*, 722 F.2d 861) and the Third Circuit (*see Hodes, supra*, 858 F.2d at 911-12), have proceeded further to examine the circumstances surrounding how and when the passenger received the ticket to determine whether he or she had sufficient opportunity to review its terms and conditions.[18] If the passenger had such an opportunity,[19]

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912 (3d Cir. 1988); *Marek v. Marpan Two, Inc.*, 817 F.2d 242 (3d Cir.), *cert. denied*, 484 U.S. 852 (1987); *Catalana v. Carnival Cruise Lines*, 618 F.Supp. 18 (D.Md. 1984), *aff'd*, 806 F.2d 257 (4th Cir. 1986); *Carpenter v. Klosters Reederi A/S*, 604 F.2d 11 (5th Cir. 1979).

[17] *Barbachym, et al. v. Costa Line, Inc., et al.*, 713 F.2d 216 (6th Cir. 1983); *Muratore v. M/S SCOTIA PRINCE*, 845 F.2d 347 (1st Cir. 1988); *Silvestri v. Italia Societa per Azioni Di Navigazione*, 388 F.2d 11 (2d Cir. 1968) (Friendly, J.); *see also The Majestic*, 166 U.S. 375 (1897). In these cases, the courts held the passenger was not bound by the terms because the terms were not incorporated into the ticket.

[18] This analytical approach is also employed by courts enforcing terms in tickets for other forms of travel. *See New York Central & Hudson River Railroad Co. v. Beaham*, 242 U.S. 148 (1916) (railroad ticket); *Diero v. American Airlines, Inc.*, 816 F.2d 1360 (9th Cir. 1987), and *Warren v. Flying Tiger Line, Inc.*, 352 F.2d 494 (9th Cir. 1965) (airline tickets).

[19] No court has imposed the requirement that the passenger have actual notice of the terms in the ticket. *See Hodes*, 858 F.2d at

these courts assumed the passenger impliedly consented to the terms in the ticket and enforced them as part of a contract.[20] It was not necessary for the passenger to assent expressly to the terms of the ticket in order for them to be enforced. *DeNicola v. Cunard Line Ltd.*, 642 F.2d at 8, n.3 (1st Cir. 1981). Other courts have explicitly rejected passengers' contentions that tickets should not be enforced because they were contracts of adhesion and the product of unequal bargaining power.[21]

The California Court of Appeal's decision and the Ninth Circuit's decision in *Shute* conflict with this approach.

911-12; *DeNicola*, 642 F.2d at 8, n.3; *Carpenter*, 604 F.2d at 13; *Geller*, 298 F.2d at 619. *See also Diero*, 816 F.2d at 1363-65.

[20] Some respondents contend (as did the Shutes and the Hodeses) that they did not have an opportunity to review the terms of the ticket and therefore cannot be assumed to have assented to them. However, the California Court of Appeal did not address this claim. It is unclear whether this was because it concluded that the ticket was presented to the respondents on a "take-it-or-leave-it" basis and therefore could not represent the intent of the parties. Nevertheless, its opinion quotes those portions from the respondents' attorney's January 29, 1990, declaration which recite that fifty-nine respondents allegedly did not have possession of their tickets in time to review the contents. This information would only be relevant to the issue of whether each respondent had an opportunity to review the terms of the ticket so as to be contractually bound by them.

The Hodeses specifically contended that their tickets were held for them by the travel club through which they purchased the tickets until they boarded the ship. *Hodes, supra*, 858 F.2d at 911-12. The Third Circuit observed that the Hodeses could have requested an opportunity to review the tickets in advance and held that, in any event, the club was serving as agent for the Hodeses; the Hodeses were consequently charged with notice of the terms. *Hodes, supra* at 911-12. *Compare, Muratore v. M/S SCOTIA PRINCE*, 845 F.2d 347 (1st Cir. 1988).

[21] *Hodes, supra*, 858 F.2d at 912-13; *Wilkinson v. Carnival Cruise Lines, Inc., supra*, 645 F.Supp. at 321; *Walker v. Carnival Cruise Lines, Inc., supra*, 681 F.Supp. at 478-79; *Kelly v. The S/S QUEEN ELIZABETH 2, etc., et al.*, 1986 A.M.C. 349, 354-55 (S.D.N.Y. 1985). *See also Shankles, supra*, 722 F.2d at 863-64.

They concur that no contract is formed unless there is agreement between the parties, but decline to follow the other circuits which conclude that the passenger assents to terms that are properly incorporated into the ticket which the passenger has an opportunity to read. Instead, they find a great disparity in bargaining power between the cruise company and the passenger, and, based on this perceived disparity, hold that the clause can only become part of the contract and bind the passenger if it was "freely negotiated".[22] They also impose the burden on the party seeking to enforce the clause to show that the clause was the result of bargaining.

This approach creates a conflict between the circuits and state courts with regard to enforcement of any clause in a ticket for passage that is part of a pre-printed form.

C. The Decision of the California Court of Appeal to Refuse to Enforce a Forum Selection Clause Is Squarely in Conflict With That of the Third Circuit in *Hodes*.

In *Hodes*, the Third Circuit enforced a forum selection clause in a pre-printed passenger ticket contract. Although the California Court of Appeal's opinion relies

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[22] Neither *Shute* nor the California Court of Appeal specify what they mean by "negotiation" or "freely bargained for" but conceivably expect visible, interactive give-and-take during the formative stages of the contract, which, presumably, would need to include the option of altering each term.

In *Northwestern National Ins. Co. v. Donovan*, 916 F.2d 372 (7th Cir. 1990) (Posner, J.) the Seventh Circuit explained the difficulty such a requirement would impose: "Ours is not a bazaar economy in which the terms of every transaction, or even of most transactions, are individually dickered; even when they are, standard clauses are commonly incorporated into the final contract, without separate negotiation of each of them." *Id.* at 377. Although *Donovan* enforced a forum selection clause in a non-maritime context and did not apply federal maritime law (the court also exhibits incomplete awareness of the facts in *Shute*), its description of the reality of modern consumer commercial transactions is accurate and just as applicable to this case.

only on the *Shute* decision to arrive at its holding and does not refer to the Third Circuit's contrary analysis and result in *Hodes*, the issues pertaining to the forum selection clauses in these actions are essentially identical.

Like the California Court of Appeal, the Third Circuit acknowledged that *The BREMEN* was controlling. *Id.* at 912. In applying *The BREMEN*, however, the Third Circuit rejected the very arguments that the California Court of Appeal accepted as to the enforceability of the clause. The Third Circuit recognized that sophisticated businessmen had negotiated the contract at issue in *The BREMEN*, and that a different set of circumstances existed in *Hodes* since the defendant cruise company had a superior bargaining position to the purchasers of the ticket and no specific bargaining of the ticket's terms was shown to have occurred. It nevertheless held that the cruise company "did not take unfair advantage of that position to 'overween' the Hodeses." *Id.* at 913. It also reviewed the physical characteristics of the ticket and found that the forum selection clause was reasonably communicated to the Hodeses. It additionally found they had an opportunity to review the terms and therefore were bound by them.

The California Court of Appeal, however, did not scrutinize the physical characteristics of the ticket to determine whether the forum selection clause was incorporated into the ticket, and did not address the claim of some of the respondents that they had not received an opportunity to read the terms of the ticket. Instead, it found the forum selection clause to be "invalid as the product of overreaching, i.e., a contract of adhesion." Pet. App. 9a. It did not describe how petitioner had overreached. While it acknowledged that the undisputed evidence showed that any respondent could have obtained a copy of the terms and conditions in petitioner's ticket prior to deciding to purchase the ticket (Pet. App. 7a), it found this irrelevant because "[n]o evidence was submitted by Carnival with regard to the procedure, if any,

for negotiation of the terms of the ticket contract . . . ." Pet. App. 7a, n.5.[23]

The Third Circuit in *Hodes* found the forum selection clause was reasonable and should be enforced. It pointed out the cruise company had a legitimate interest in seeking certainty as to where suit could be brought against it because its cruise ship travelled to a number of jurisdictions and drew passengers worldwide. It also rejected the claim of the Hodeses that they would "for all practical purposes be deprived of [their] day in court," *id.* at 916 (*quoting The BREMEN*, 407 U.S. at 18) because the Hodeses could not show either that they "would face blatant prejudice in the foreign forum" or that litigation in the contractual forum "would be severely impractical." 858 F.2d at 916.[24]

The California Court of Appeal also recited *The BREMEN* standard, but it failed to properly apply it to determine whether it would be unreasonable to enforce the contract clause.[25] It considered only the convenience to respondents from the lawsuits remaining in California, and, with regard to the two hundred thirty-eight respondents in *Williams*, relied exclusively on the conclusory hearsay declarations of their attorney.[26]

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[23] *See also* discussion *supra* at n.22.

[24] The Hodeses also advanced a public policy argument, based on 46 U.S.C. §§ 183b and 183c and on common law, that the forum selection clause was invalid because Italian law might enforce provisions of the contract limiting the amount of defendant's liability for negligence. 858 F.2d at 914-15. Following *The BREMEN*, the court rejected that argument. *Id.* No such issue of choice of law is present in this case since federal maritime law will apply even if the lawsuits are required to proceed in Florida. *See* n.14, *supra*.

[25] A refusal to enforce a forum selection clause is subject to review *de novo*. *Hodes, supra*, 858 F.2d at 908-9. (Cites omitted).

[26] No other declarations or testimony were submitted on behalf of these 238 respondents.

The California Court of Appeal acknowledged petitioner's evidentiary objections (Pet. App. 5a, n.3) but sought to justify its

It did not weigh the inconvenience to Carnival, and failed to evaluate the totality of factual circumstances by not considering the following undisputed evidence in the record: the M/V TROPICALE is more accessible from the contract forum of Florida since the vessel no longer calls at the West Coast of the United States but is sailing in the Caribbean;[27] the majority of Carnival's fact witnesses (who were among the 500 plus crew onboard the M/V TROPICALE during the voyage in question) are either onboard the M/V TROPICALE or on one of Carnival's six other vessels sailing from Florida;[28] Carnival's principal place of business, legal department and passenger claims department are in Miami, Florida (Pet. App. 17a-18a).

Further, the Court of Appeal did not consider that two hundred thirty-eight respondents had pooled their resources together, hired one lawfirm and filed one complaint. Each of these respondents will be able to minimize the impact of the increased financial cost, if any, of the lawsuit proceeding in Florida by dividing the extra expense between themselves. It also failed to note that any court in Florida will be as qualified to offer respondents any relief they may prove themselves to be entitled to receive. This limited and one-sided inquiry

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reliance on the hearsay declarations by stating that "[p]laintiffs would substantiate the information in question . . . when they are deposed or in response to interrogatories." *Id.* This conclusion, based on speculation, not only does not protect petitioner but also irreparably prejudices it because once it answers in the actions and propounds interrogatories, it will be deemed by state procedural law to have waived its right to enforce the forum selection clause. *See* nn.5 and 6, *supra*.

[27] The location of the vessel is highly relevant during discovery given respondents' wide-ranging complaints regarding every facet of operation of the ship. These allegations are summarized in the California Court of Appeal's opinion, Pet. App. 2a-3a.

It will no doubt also be beneficial for the jury to view the physical structure and premises onboard. *See Hodes*, 858 F.2d at 916.

[28] *See* declaration of Winson, reproduced at Pet. App. 17a-18a.

violates this Court's directive in *The BREMEN* that, among others things, the party opposing the contract clause show that the "*balance* of convenience" (emphasis added) strongly favors a non-contractual forum before a forum selection clause is found unreasonable.

The inter-circuit conflict on this issue was not resolved by the Court's decision in *Stewart Organization, Inc., et al v. Ricoh Corp.*, 487 U.S. 22 (1988), which addressed the enforcement of a forum selection clause under federal procedural law, i.e., 28 U.S.C. § 1404(a).[29] Nevertheless, *Stewart*'s approval of a general policy of giving weight to forum selection clauses should have been taken into account by the California Court of Appeal. *See Stewart*, 487 U.S. at 29, 31; *id.* at 33 (Kennedy, J., concurring).[30]

D. This Is an Appropriate Case for Resolving the Issue Presented.

This case, along with *Shute*, presents an occasion for the Court to resolve an inter-circuit and state court conflict regarding enforcement of forum selection clauses in ticket contracts, which is an issue that arises frequently in federal and state court litigation. Uniform national application of federal maritime law is particularly desirable on this issue to achieve the certainty and predictability that such clauses are intended to achieve. Because of this Court's decision in *Lauro Lines* terminating interlocutory appeals from federal courts on this

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[29] In *The BREMEN* this Court enforced a forum selection clause under federal maritime law without entering into the analysis of factors relevant to § 1404(a). There is no indication that *Stewart* was intended to modify the holding of *The BREMEN* in this regard.

[30] Such a policy enhances predictability, permits courts to avoid expending their resources to have to resolve motions brought to enforce such clauses, and reduces for parties the costs associated with litigation. *See Stewart*, 487 U.S.C. at 33 (Kennedy, J., concurring).

issue, the issue is now less likely to be brought for review before an appellate court. However, in light of the recently created conflict among the circuits and state courts, this issue is now likely to be litigated more frequently.

The record shows that respondents had an opportunity to obtain and review all terms and conditions of the ticket well before they purchased the tickets and used them for the cruise. It also shows that respondents failed to meet their heavy burden as set forth in *The BREMEN* of showing why they should be allowed to escape the effect of the forum selection clause. The analytical approach employed by the First, Second, Third, Fourth, Fifth and Sixth Circuits satisfactorily reflects commercial realities and protects passengers. There is no necessity or justification for imposing on carriers the onerous obligation to show that each passenger freely bargained for each clause in the ticket before a clause can be enforced. Any such procedure would be commercially impractical, and would only prevent enforcement of forum selection clauses.

Carriers have a legitimate interest in limiting disputes contractually to a reasonable forum, especially where multiple claims arise from a single incident. The *Hodes* litigation and the *Lauro Lines* litigation, both arising from the *Achille Lauro* tragedy, illustrate the possibility of related claims being brought in various jurisdictions.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX

COURT OF APPEAL, SECOND DISTRICT
DIVISION 3

B050142, B050255

CARNIVAL CRUISE LINES, INC.,
Petitioner,

v.

THE SUPERIOR COURT OF THE STATE OF CALIFORNIA,
FOR THE COUNTY OF LOS ANGELES,
Respondent,

MILDRED WILLIAMS, *et al.*,
Real Parties In Interest.

Aug. 21, 1990

Graham & James and Allan A. Shenoi, for petitioner.

No appearance, for respondent.

Silver, McWilliams, Stolpman, Mandel, Katzman, Krissman & Elber, Donna Silver, Roman Mosqueda and Miguel P. Inumerable, for real parties in interest.

DANIELSON, Associate Justice.

Carnival Cruise Lines, Inc. (Carnival) petitions this court for writs of mandate directing the trial court to vacate its orders denying their motions to dismiss or stay in Williams v. Carnival Cruise Lines, Inc. (LASC No. SOC 96347) (*Williams*) and Secard v. Carnival Cruise Lines, Inc. (LASC No. SOC 96301) (*Secard*) and to enter new and different orders granting the motions.

We have consolidated the two proceedings since they present identical questions of law and fact.

We deny the petitions and discharge the alternative writs.

ISSUE PRESENTED

Tickets purchased by plaintiffs in the underlying actions (plaintiffs), for a roundtrip cruise from Los Angeles to Mexico and back on a ship owned and operated by Carnival, contained a forum-selection clause which provided that all disputes arising under or in connection with the ticket contract would be litigated, if at all, in a court located in Florida. The core issue presented is whether that forum-selection clause is enforceable to preclude plaintiffs from pursuing their actions in the Los Angeles, California, Superior Court, for damages sustained by them during their cruise as a result of the alleged negligence of Carnival.

We hold that, under the facts of this case, the forum-selection clause in the Carnival ticket contract is not enforceable.

FACTUAL AND PROCEDURAL STATEMENT

Plaintiffs assert that they received injuries through the negligence of Carnival during a seven-day sea cruise as passengers on a ship, the M/V Tropicale, owned and operated by Carnival. The voyage allegedly began on or about January 17, 1988, at Port of Los Angeles, was bound for Puerto Vallarta and other places in Mexico, and ended on or about January 24, 1988, at Port of Los Angeles.

In sum, plaintiffs allege that Carnival was negligent in that: (1) it knew of an impending severe storm, but failed to inform plaintiffs of the dangers thereof; (2) it proceeded to leave port despite the storm warning and without taking proper precautions to minimize the effects of the storm; (3) it failed to provide adequate

safety equipment, e.g., life jackets and/or life vests for all passengers, or to distribute the safety equipment which was aboard the ship to the passengers; (4) it failed to properly staff the vessel and to train the staff to meet the safety needs of the passengers in an emergency situation; (5) it failed to provide adequate safety instructions and directions to the passengers and crew; (6) it failed properly to inspect the ship and maintain it in a safe condition, e.g., the port engine and stabilizer did not function properly; (7) it failed to properly maintain, repair, inspect or otherwise control the M/V Tropicale and to assure its seaworthiness prior to and at the time of departure; and (8) it provided tug boat services which caused the M/V Tropicale to hit the dock as it was being assisted in leaving the port.

On September 15, 1989, in *Williams*, Carnival appeared specially and filed a motion to dismiss or stay under Code of Civil Procedure section 410.30.[1] Carnival argued that dismissal or stay of the action was mandated on the ground that plaintiffs had agreed to litigate any controversy arising from the subject voyage in the State of Florida.

On September 25, 1989, a substantially identical special appearance and motion was filed by Carnival in *Secard*.

In support of the motions, Carnival referred to the following provisions in the ticket contracts between itself and plaintiffs: [2]

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[1] Code of Civil Procedure section 410.30, subdivision (a), provides: "[W]hen a court upon motion of a party or on its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action."

[2] The record does not include a copy of any ticket. However, at oral argument, counsel for Carnival supplied the court with a facsimile of the subject tickets, which we have reviewed.

Clause 3(a) on page 1 of the contract read:

"The acceptance of this ticket by the person or persons named hereon as passengers shall be deemed to be an acceptance and agreement by each of them of all of the terms and conditions of this Passage Contract Ticket."

Caluse 8, also on page 1 of the ticket contract, read:

"It is agreed by and between the passenger and the Carrier that all disputes and matters whatsoever arising under, in connection with or incident to this Contract shall be litigated, if at all, in and before a Court located in the State of Florida, U.S.A., to the exclusion of the Courts of any other state or country."

In his supporting declaration, dated September 14, 1989, at Miami, Florida, Bruce A. Jordan (Jordan), an assistant general counsel of Carnival, stated that Carnival is a Panamanian corporation with its principal place of business in Miami, Florida. He further stated that all passenger claims are handled exclusively in its Miami offices.

In opposition filed January 31, 1990, the *Williams* plaintiffs asserted the forum-selection clause was unenforceable. They argued that the clause was unreasonable, not reasonably communicated to plaintiffs, and not freely bargained for. They further argued that enforcement of the clause was barred by federal statute (46 U.S.C.App. § 183(c)) and would violate the principles set forth in *The Bremen v. Zapata Off-Shore Co.* (1972) 407 U.S. 1, 18, 92 S.Ct. 1907, 1917, 32 L.Ed.2d 513.

In her opposing declaration dated January 29, 1990, Donna Silver (Silver), an attorney for the *Williams* plaintiffs, stated: "[O]f the 238 plaintiffs, close to two-thirds of them (153) are California residents. Of the remaining 85 plaintiffs, close to one-half (38) are residents of Western states, including Oregon, Washington, Nevada, Arizona, New Mexico and Montana. The re-

maining 47 plaintiffs are from various Midwest and East coast states, Canada and Hawaii. Not a single plaintiff is a resident of Florida."

She further stated that the one plaintiff claiming awareness of the forum-selection clause prior to departure did not have cancellation insurance. The tickets were subject to cancellation charges by Carnival.

With respect to receipt of tickets, Silver stated: At least 44 of the plaintiffs received their tickets upon actual embarking of the vessel on January 17, 1988. At least five plaintiffs received boarding passes only, no ticket at all. At least six plaintiffs received their tickets on the day of departure, four of whom received them two hours before embarkation, and at least four plaintiffs received the tickets the day before the cruise.

With respect to inconvenience to plaintiffs, Silver stated: At least 30 plaintiffs asserted they are physically unable to travel to Florida due to age and medical problems. At least one-half of the remaining plaintiffs would suffer hardship and inconvenience due to health and medically related problems, dependency of minors and other family members, and work commitments. At least 145 plaintiffs, over one-half of all plaintiffs in *Williams*, contend they are financially unable to pursue their action in Florida.[3]

In opposition filed February 7, 1990, the *Secard* plaintiffs took the position that enforcement of the forum-selection provision would be unreasonable for the reasons that: (1) there was no evidence that the provision was

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[3] On April 3, 1990, Carnival filed objections to the contents of the Silver declaration. In response Silver filed a declaration dated April 9, 1990, in which she stated that the factual information set forth in her declaration above came from her personal review of communications between plaintiffs and herself. Plaintiffs would substantiate the information in question, i.e., paragraphs 4-12, when they are deposed or in response to interrogatories.

freely bargained for; and (2) plaintiffs would for all practical purposes be deprived of their day in court since enforcement of the provision would be gravely difficult and inconvenient.

In his opposing declaration Miguel P. Inumerable, the *Secard* plaintiffs' attorney, stated that among the witnesses who would be inconvenienced by a Florida forum are the physicians who treated the *Secard* plaintiffs and the employees of the United States Weather Service who reside and are employed in California.

In their respective declarations, the *Secard* plaintiffs, Antoinette, Ed, Fred, George, and Joan, each stated that he or she was treated for the injuries sustained during the voyage by Dr. Peter Yatar, of the City of Industry, California, and Dr. Dale Kellon, in Covina, California.

In its reply filed April 3, 1990, in both cases Carnival asserted the forum-selection clause was enforceable. It argued that the passengers had adequate notice of the terms of the contract, including the forum-selection clause, since there was adequate warning of the ticket's terms, and thus, it must be presumed that the passengers consented to the clause. It further argued that enforcement of the clause was not unreasonable or unjust since plaintiffs would have a difficult time showing that they would be denied their day in court in Florida.

In his supporting declaration, executed March 29, 1990, Lawrence D. Winson (Winson),[4] General Counsel and Secretary for Carnival, stated that Carnival chose one

[4] The motions to stay or dismiss were not made on the grounds of lack of personal jurisdiction or forum non conveniens. However, in its petitions Carnival makes some arguments and sets forth statements in the declarations of Winson and Jordon in favor of the enforcement of the forum-selection clause which really pertain only to a claim of forum non conveniens and the bar of lack of personal jurisdiction, e.g., lack of minimum contracts with California. (See, e.g., *Dialysis At Sea, Inc. v. Superior Court* (1989) 216 Cal.App.3d 788, 792-796, 265 Cal.Rptr. 71.)

specific venue for litigation against it in order to prevent it from being sued in varied and far-flung jurisdictions by thousands of passengers. Carnival inserted the forum-selection clause to create a certainty, not to inconvenience passengers or arbitrarily, so that it would not face global litigation.

Winson further stated that Florida was selected as the venue, because its head office, legal department, and passenger claims processing personnel are all located there. Also located there were seven of its eight vessels which sail from Florida and Caribbean ports.

Winson also declared that if any passenger or travel agent requested Carnival to provide them with a copy of the terms and conditions of the ticket contract in order for them to evaluate the terms and decide whether they wanted to travel with Carnival, Carnival would have provided them with a copy.[5]

On April 12, 1990, following a hearing, the court denied the motions, in the *Williams* and *Secard* cases. The court reasoned:

"I cite the case cited by moving party, which is Full-Sight versus Soft-Lenses. First you have a contract [of] adhesion and, in my view, it would be, under that case, both unreasonable and unjust to transfer these cases for the benefit of one defendant in Florida, as opposed to the convenience of two hundred thirty-eight or more plaintiffs in California, where the vessel left a California port, the storm occurred in the Pacific, whatever medical treatment they received on ship was on an emergency basis, and upon the return was rendered here. [¶] This is the

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[5] No evidence was submitted by Carnival with regard to the procedure, if any, for negotiation of the terms of the ticket contract, *e.g.*, the forum-selection clause. At oral argument counsel for Carnival conceded he knew of none.

logical and the just place for the venue to be laid in this case." [6]

DISCUSSION

The sole issue presented by this writ proceeding is whether enforcement of the forum-selection clause would be unfair, unreasonable or unjust or otherwise invalid. We hold that the forum-selection clause, which designates Florida as the proper venue, is unenforceable on the grounds that enforcement would be "unfair, unjust, or unreasonable," and the clause is also invalid as the product of over-reaching.

Federal law governs the validity of the forum selection clause in this instance since a passenger ticket contract for an ocean voyage constitutes a contract under maritime law. (See, e.g., *Hodes v. S.N.C. Achille Lauro ed. Altri-Gestione* (3d Cir. 1988) 858 F.2d 905, 909; *Shute v. Carnival Cruise Lines* (9th Cir. 1990) 897 F.2d 377, 386.)

It is established that a forum-selection clause is prima facie valid and that such a clause should not be set aside unless the party challenging it can "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." (*The Bremen v. Zapata Off-Shore Co., supra*, 407 U.S. 1, 15, 92 S.Ct. 1907, 1916; *Shute v. Carnival Cruise Lines, supra*, 897 F.2d 377, 388.)

In *The Bremen* the United States Supreme Court upheld a forum-selection clause designating the London Court of Justice as the proper venue for any dispute arising from the contract between Zapata, an American corporation, and Unterwesser, a German corporation, whereby Unterwesser agreed to tow a Zapata oil rig from Louisiana to some point in the Adriatric Sea off Ravenna, Italy. After the rig was damaged in the Gulf of Mexico,

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[6] The case referred to above by the court is *Full-Sight Contact Lens v. Soft Lenses, Inc.*, 466 F.Supp. 71 (S.D.N.Y., 1978).

Zapata brought an action in a Florida United States district court. In upholding the forum-selection clause *The Bremen* court found that Zapata had failed to meet its burden to "clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." (*The Bremen v. Zapata Off-Shore Co., supra,* 407 U.S. 1, 15, 92 S.Ct. 1907, 1916.)

The *Shute* court found *The Bremen* to be factually distinguishable, noting: ". . . *The Bremen* involved a large, complex commercial contract between two sophisticated parties. There was no evidence in *The Bremen* that the parties were in an unequal bargaining position. [Citation.]" (*Shute v. Carnival Cruise Lines, supra,* 897 F.2d 377, 388.)

In *Shute* the court had before it the identical forum-selection clause involved in the proceedings now before this court. (*Id.* at p. 379.) The *Shute* court held that this clause was unenforceable on two independent grounds: "First, there is no evidence that the provision was freely bargained for" (*id.* at p. 388); and second, "[t]he fact that enforcement of the clause in this case would 'be so gravely difficult and inconvenient' that the plaintiffs would 'for all practical purposes be deprived of [their] day in court,' [citation] provides an independent justification for refusal to enforce the forum selection clause. [Citation.] . . . There is evidence in the record to indicate that the Shutes are physically and financially incapable of pursuing this litigation in Florida." (*Id.* at p. 389.)

Based on our review of the record and applicable law we conclude that the trial court was correct in finding that the subject forum-selection clause was invalid as the product of overreaching, i.e., a contract of adhesion, and was unenforceable in that it would be unreasonable and unjust for venue to lie in Florida.

In the present cases, as in *Shute*, there is no evidence that the forum-selection clause was freely bargained for by the plaintiffs; thus it constitutes an instance of untenable "overreaching" by Carnival. As the *Shute* court aptly reasoned: "To the contrary, the provision is printed on the ticket, and presented to the purchaser on a take-it-or-leave-it basis. . . . Even if we assume that the Shutes had notice of the provision, there is nothing in the record to suggest that the Shutes could have bargained over this language. Because this provision was not freely bargained for, we hold that it does not represent the expressed intent of the parties, and should not receive the deference generally accorded to such provisions." (*Shute v. Carnival Cruise Lines, supra*, 897 F.2d at pp. 388-389; fns. omitted.)

An independent, alternative basis for holding the forum-selection clause to be unenforceable is our conclusion that enforcement of the clause "would 'be so gravely difficult and inconvenient' that the plaintiffs would 'for all practical purposes be deprived of [their] day in court' ". (*Shute v. Carnival Cruise Lines, supra*, 897 F.2d at 389, quoting from *The Bremen, supra*, 407 U.S. at p. 18, 92 S.Ct. at p. 1917.) The evidence reflects that some of the plaintiffs would be physically and financially incapable of pursuing their action against Carnival in Florida.

DECISION

The petitions for writs of mandate are denied. The alternative writs, having served their purpose, are discharged.

KLEIN, P.J., and CROSKEY, J., concur.

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

Second Appellate District, Division Three, No. B050142
S017717

CARNIVAL CRUISE LINES INC.,
Petitioner

v.

LOS ANGELES COUNTY SUPERIOR COURT,
Respondent

MILDRED WILLIAMS *et al.*,
Real Parties In Interest

ORDER DENYING REVIEW
AFTER JUDGMENT BY THE COURT OF APPEAL

[Filed Nov. 15, 1990]

Petition for review DENIED.

/s/ Lucas
Chief Justice

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
Washington, D.C. 20543

January 22, 1991

JOSEPH F. SPANIOL, JR.
Clerk of The Court

Mr. Allan A. Shenoi
Graham & James
One World Trade Ctr., Ste. 1800
Long Beach, CA 90831-1800

RE: Carnival Cruise Lines, Inc. v. Superior Court of California, County of Los Angeles (Mildred Williams, et al., real parties in interest)

—and—

Carnival Cruise Lines, Inc. v. Superior Court of California, County of Los Angeles (Antoinette Secard, et al., real parties in interest) No. A-540

Dear Mr. Shenoi:

The Court today entered the following order in the above-entitled case:

"The application to stay proceedings in the Superior Court of California, County of Los Angeles, case Nos. SOC 96347 and SOC 96301, presented to Justice O'Connor and by her referred to the Court is granted pending the timely filing and disposition of a petition for a writ of certiorari. Should the petition for a writ of certiorari be denied, this order is to terminate automatically. In the event the petition for a writ of certiorari is granted, this order is to remain in effect pending the issuance of the mandate of this Court to the Court of Appeal of California, Second District, Nos. B050142 and B050255."

Very truly yours,

JOSEPH F. SPANIOL, JR.
Clerk

By /s/ Christopher W. Vasil
CHRISTOPHER W. VASIL
Deputy Clerk

em

cc: Donna Silver
Roman P. Mosqueda
Clerk, Superior Court of California, County of Los Angeles (Your Nos. SOC 96347 and SOC 96301)
Clerk, Court of Appeal of California, Second District (Your Nos. B050142 and B050255)

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES

DEPARTMENT SOUTH H
HON. WILLIAM M. SUTTON, JR., JUDGE

No. SOC 96347

MILDRED WILLIAMS,
Plaintiff,
vs.
CARNIVAL CRUISE LINES, INC.,
Defendant.

No. SOC 96301

ANTOINETTE SECARD, *et al.*,
Plaintiff,
vs.
CARNIVAL CRUISE LINES, INC., *et al.*,
Defendant.

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Thursday, April 12, 1990

APPEARANCES:

For the Plaintiff:

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By: DONNA SILVER
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For the Plaintiff:

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Long Beach, California 90807

For the Defendant:

GRAHAM & JAMES
By: ALLAN A. SHENOI
100 Oceangate
Suite 300
Long Beach, California 90802

[1] LONG BEACH, CALIFORNIA
THURSDAY, MARCH 12, 1990
A.M. SESSION

THE COURT: Twenty-one and twenty-two.

MR. SHENOI: Good morning, Your Honor.

Allan Shenoi on behalf of Carnival.

MR. INUMERABLE: Good morning.

Miguel Inumerable on behalf of plaintiffs on number twenty-one.

MS. SILVER: Donna Silver, on number twenty-two, on behalf of plaintiff Mildred Williams, et al.

THE COURT: I cite the case cited by moving party, which is full-sight versus soft-lenses. First you have a contract adhesion; and, in my view, it would be, under that case, both unreasonable and unjust to transfer these cases for the benefit of one defendant in Florida, as opposed to the convenience of two hundred thirty-eight or more plaintiffs in California, where the vessel left a California port, the storm occurred in the Pacific, whatever medical treatment they received on ship was on an emergency basis, and upon the return was rendered here.

This is the logical and the just place for the venue to be laid in this case.

[2] And so the motions are denied.

MS. SILVER: Thank you, Your Honor.

MR. INUMERABLE: Thank you, Your Honor.

THE CLERK: Is noticed waived?

MR. SHENOI: No.

THE COURT: All right. Respondent on each motion give notice.

MR. INUMERABLE: Thank you, Your Honor.

MS. SILVER: Thank you, Your Honor.

MR. SHENOI: Thank you.

(The proceedings in the above-entitled matter were concluded.)

DECLARATION OF LAWRENCE D. WINSON

[Filed by Petitioner with the California Superior Court on April 3, 1990]

I, Lawrence D. Winson, declare as follows:

1. I am General Counsel and Secretary for Carnival Cruise Lines, Inc., a Panamanian corporation, and in that capacity am familiar with its policies, personnel, records, ticket contract of passage, and business volume and practices.

2. Carnival currently has eight cruise vessels. Each year tens of thousands of passengers travel from many different and distant destinations and countries to ports such as Acapulco, Mazatlan, Cabo San Lucas, Los Angeles, Puerto Rico, Miami, and other ports, to travel on Carnival ships.

3. Carnival chose one specific venue for litigation against it, in order to prevent itself from being sued in the varied and far-flung home jurisdictions of literally thousands of passengers.

4. Carnival did not arbitrarily introduce the forum selection clause in its ticket contract of passage to inconvenience passengers. It did so because the forum selection clause creates certainty as to where suit against Carnival can be brought, and assures Carnival that it will not face global litigation.

5. If Carnival did not have a forum selection clause, it would experience much uncertainty, possibly great inconvenience and certainly significantly greater expense if suit could be brought against it anywhere where potential claimants might choose to sue.

6. Florida was selected as the venue because Carnival's head office is in Miami, Carnival's legal department and passenger claims processing personnel are all located in Miami, and seven of Carnival's eight vessels sail from

Florida and Caribbean ports. Although Carnival is a Panamanian corporation, it did not select a city in Panama as its choice for the contractually established venue, because it knew that such a selection would not be as related to Carnival's activities as a Florida forum.

7. The M/V TROPICALE is no longer sailing from Los Angeles, but is currently sailing weekly from the port of San Juan, Puerto Rico to St. Croix, Guadalupe, Grenada, La Guaira/Carracas and Aruba.

8. Accompanying the M/V TROPICALE in the Caribbean is its compliment of 500 plus offiers and crew. Many of these crewmembers were onboard the M/V TROPICALE during plaintiffs' cruise. Others are working on other Carnival ships sailing from Florida.

9. I have caused Carnival's business records for voyage 4804 (January 17-24, 1988) on the M/V TROPICALE to be reviewed, and from this review it has been determined that tickets for passengers Diana Fowler and Mr. Secard were mailed in the United States mail postage prepaid, to their travel agency, Express Travel, on November 23, 1987.

10. If any passenger or travel agent requested Carnival to provide them with a copy of the terms and conditions in its ticket contract in order for them to evaluate the terms of the ticket contract and decide whether they wanted to travel with Carnival, Carnival would have provided them with a copy.

I declare under penalty of perjury under the laws of the State of California and the United States that the foregoing is true and correct.

Executed this 29th day of March, 1990, at Miami, Florida.

/s/ Lawrence D. Winson
LAWRENCE D. WINSON

STATUTES INVOLVED

CALIFORNIA CODE OF CIVIL PROCEDURE

§ 410.30. Stay or dismissal of action; exceptions; duration of section

Text of section operative until Jan. 1, 1992.

(a) Except as provided in subdivision (b), when a court upon motion of a party or its own motion finds that in the interest of substantial justice an action should be heard in a forum outside this state, the court shall stay or dismiss the action in whole or in part on any conditions that may be just. The domicile or residence in this state of any party to the action shall not preclude the court from staying or dismissing the action.

(b) Subdivision (a) does not apply to an action arising out of, or relating to, a contract, agreement, or undertaking to which Section 410.40 applies.

(c) The provisions of Section 418.10 do not apply to a motion to stay or dismiss the action by a defendant who has made a general appearance.

This section shall remain in effect only until January 1, 1992, and as of that date is repealed, unless a later enacted statute, which is enacted before January 1, 1992, deletes or extends that date. If that date is not deleted or extended then, on and after January 1, 1992, pursuant to Section 9611 of the Government Code, Section 410.30 of the Code of Civil Procedure, as amended by Section 1 of Chapter 601 the Statutes of 1972, shall have the same force and effect as if this temporary provision had not been enacted.

§ 418.10. Motion to quash service of summons or to stay or dismiss action; procedure

(a) A defendant, on or before the last day of his or her time to plead or within any further time that the court may for good cause allow, may serve and file a notice of motion either or both:

(1) To quash service of summons on the ground of lack of jurisdiction of the court over him or her.

(2) To stay or dismiss the action on the ground of inconvenient forum.

(b) The notice shall designate, as the time for making the motion, a date not more than 30 days after filing of the notice. The notice shall be served in the same manner, and at the same times, prescribed by subdivision (b) of Section 1005. The service and filing of the notice shall extend the defendant's time to plead until 15 days after service upon him or her of a written notice of entry of an order denying his or her motion, except that for good cause shown the court may extend the defendant's time to plead for an additional period not exceeding 20 days.

(c) If the motion is denied by the trial court, the defendant, within 10 days after service upon him or her of a written notice of entry of an order of the court denying his or her motion, or within any further time not exceeding 20 days that the trial court may for good cause allow, and before pleading, may petition an appropriate reviewing court for a writ of mandate to require the trial court to enter its order quashing the service of summons or staying or dismissing the action. The defendant shall file or enter his or her responsive pleading in the trial court within the time prescribed by subdivision (b) unless, on or before the last day of the defendant's time to plead, he or she serves upon the adverse party and files with the trial court a notice that he or she has petitioned for a writ of mandate. The service

and filing of the notice shall extend the defendant's time to plead until 10 days after service upon him or her of a written notice of the final judgment in the mandate proceeding. The time to plead may for good cause shown be extended by the trial court for an additional period not exceeding 20 days.

(d) No default may be entered against the defendant before expiration of his or her time to plead, and no motion under this section, or under Section 473 or 473.5 when joined with a motion under this section, or application to the court or stipulation of the parties for an extension of the time to plead, shall be deemed a general appearance by the defendant.

§ 904.1. Superior courts; appealable judgments and orders

An appeal may be taken from a superior court in the following cases:

(a) From a judgment, except (1) an interlocutory judgment, other than as provided in subdivisions (h) and (i), (2) a judgment of contempt which is made final and conclusive by Section 1222, (3) a judgment on appeal from a municipal court or a justice court or a small claims court, or (4) a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition directed to a municipal court or a justice court or the judge or judges thereof which relates to a matter pending in the municipal or justice court. However, an appellate court may, in its discretion, review a judgment granting or denying a petition for issuance of a writ of mandamus or prohibition, or a judgment or order for the payment of monetary sanctions, upon petition for an extraordinary writ.

(b) From an order made after a judgment made appealable by subdivision (a).

(c) From an order granting a motion to quash service of summons or granting a motion to stay or dismiss the action on the ground of inconvenient forum.

(d) From an order granting a new trial or denying a motion for judgment notwithstanding the verdict.

(e) From an order discharging or refusing to discharge an attachment or granting a right to attach order.

(f) From an order granting or dissolving an injunction, or refusing to grant or dissolve an injunction.

(g) From an order appointing a receiver.

(h) From an interlocutory judgment, order, or decree, hereafter made or entered in an action to redeem real or personal property from a mortgage thereof, or a lien thereon, determining the right to redeem and directing an accounting.

(i) From an interlocutory judgment in an action for partition determining the rights and interests of the respective parties and directing partition to be made.

(j) From an order made appealable by the provisions of the Probate Code or the Family Law Act, Part 5 (commencing with Section 4000).

(k) From a superior court judgment directing payment of monetary sanctions by a party or an attorney for a party only if the amount exceeds seven hundred fifty dollars ($750). Lesser sanction judgments against a party or an attorney for a party may be reviewed on an appeal by that party after entry of final judgment in the main action, or, at the discretion of the court of appeal, may be reviewed upon petition for an extraordinary writ.

(2)

No. 90-1222

Supreme Court, U.S.
FILED
MAR 4 1991
OFFICE OF THE CLERK

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
MILDRED WILLIAMS, et al.,
Respondents.

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
ANTOINETTE SECARD, et al.,
Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal, Second District, Division 3

BRIEF IN OPPOSITION

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RESTATEMENT OF THE QUESTION PRESENTED

Is a printed forum selection clause in a passenger ticket for an open voyage enforceable under federal maritime law in the following factual context:

(a) Two hundred forty-four passengers filed two suits in the home port or cruise situs of the subject vessel;

(b) Some respondents had no knowledge of the forum selection clause until the transactions were complete (tickets were paid before delivery to them or their travel agents);

(c) The performance of the contract occurred in California;

(d) Some respondents would be physically and financially incapable of pursuing their action in Florida.

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No. 90-1222

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OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
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CARNIVAL CRUISE LINES, INC.,
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VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
ANTOINETTE SECARD, et al.,
Respondents.

Petition for a Writ of Certiorari to the California Court of Appeal, Second District, Division 3

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

This brief in opposition to the petition for a writ of certiorari is filed by the six (6) respondents in *Secard*,[1] all residents of Southern California, who sued petitioner and others[2] in the Superior Court of the State of California.[3]

The respondents in *Secard* perceive the selective assertion, as well as, omission of certain facts and procedure in the statement of the case of the petition, as prejudicially misleading, and incorporate by reference the factual and procedural statement of the decision of the California Court of Appeal. Pet. App. 2a-8a.

In addition, five (5) of the respondents[4] in *Secard* submitted individual declarations under penalty of perjury in the Superior Court, stating the facts on lack of free bargaining on the forum selection clause of the passenger ticket, all their residences in Southern California, their treatment with physicians in Southern Califor-

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[1]They are Antoinette Secard, Edward Secard, Fred Secard, George Secard, Joan Secard and Diane Fowler.

[2]Does 1 to 100, inclusive, were sued by the *Secard* respondents as additional defendants.

[3]The *Secard* respondents filed their complaint (Case No.: SOC 96301) in the South District (Long Beach, California) of the Superior Court of the State of California for the County of Los Angeles. They boarded petitioner's liner, M/V TROPICALE, at its home port at the Port of Los Angeles in San Pedro, California. It is of Liberian registry.

[4]Respondent Diane Fowler was unable to submit her declaration on time, but her circumstances are similar to the other five *Secard* respondents.

nia, the inconvenience and expense to them to litigate their actions in Florida, and other relevant matters.[5]

ARGUMENTS FOR DENYING THE PETITION

I.

THE ISSUE, AS DETERMINED BY THE FACTS, IN *SHUTE* (NO. 89-1647) IS DISTINGUISHABLE FROM THE QUESTION PRESENTED IN THIS PETITION.

The Ninth Circuit, in *Shute v. Carnival Cruise Lines,*[6] held that: "We also find the forums selection clause requiring suit to be brought in Florida to be unenforceable in *these circumstances*". (Emphasis supplied.) *Id.* at 389.

The facts in *Shute* are distinguishable from the facts in this petition. *Shute* involves the suit of one passenger, Eulalia Shute, for injuries sustained on board the M/V TROPICALE, filed in the Washington district court. *Id.* at 379. This petition involves the suits of two hundred forty-four passengers, for injuries and other damages on board the same vessel, filed in the same California Superior Court.

In *Shute,* petitioner Carnival Cruise Lines, Inc., "never operated ships which have called at Washington ports". *Id.* This petition involves suits filed in the home port of the M/V TROPICALE, the port of Los Angeles in San Pedro, California. Mrs. Shute, just like all the respon-

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[5]These declarations of the respondents in *Secard* were filed with the Superior Court on January 29, 1990 in support of their opposition to petitioner's motion to dismiss lawsuit pursuant to contractual forum selection clause.

[6]897 F.2d 377 (9th Cir. 1990).

dents in this petition, had to embark in Los Angeles, California, for various ports in Mexico and then return to the Port of Los Angeles. *Id.* Performance occurred in the Port of Los Angeles.

In *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione,* 858 F.2d 905 (3rd Cir. 1988), the Third Circuit considered "(t)he choice of Italian venue for disputes arising out of a cruise on an Italian vessel, departing from and returning to Italy (as) sensible and fair choice". *Id.* at 913.[7] It added that "(i)ndeed, it was the most reasonable choice of venue, if a choice was to be made". *Id.*

II.

THERE IS NO DIRECT CONFLICT AMONG THE CIRCUITS AND STATE COURTS AS TO THE ENFORCEMENT OF FORUM SELECTION CLAUSES IN PASSENGER TICKET CONTRACTS.

A. The *BREMEN* Standards, Articulated By This Court To Resolve The Differing Approaches By The Circuits, Are Controlling On The Enforceability Of Forum Selection Clauses.

In *The Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972), this Court resolved the different approaches taken by the Circuits[8] by enunciating standards on the enforceability of forum selection clauses.

This Court, through Mr. Chief Justice Burger, held in *The Bremen,* that:

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[7]While the Third Circuit in *Hodes* found the forum selection clause to be enforceable, it did so on the facts of the case, as shall be discussed later in this brief in opposition.

[8]This Court cited the cases decided by Third, Second and Fifth Circuits. 407 U.S. 2, footnote 1.

> The correct approach would have been to enforce the forum clause specifically unless Zapata could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching. *Id.* at 15.

The California Court of Appeal's decision, following the *Bremen* standards, found the forum-selection clause invalid "as the product of overreaching, i.e., a contract of adhesion, and was unenforceable in that it would be unreasonable and unjust for venue to lie in Florida." Pet. App. 9a.

There is evidence that respondents in *Secard* did not freely negotiate the choice of forum at "arm's-length," and that the passenger ticket had "boilerplate language" that respondents "had no power to alter."[9]

There is further evidence as found by the California Court of Appeal, that enforcement of the forum selection clause "would 'be so gravely difficult and inconvenient' that the plaintiffs would 'for all practical purposes be deprived of (their) day in court'." Pet. App. 10a.[10]

Indeed, the California Court of Appeals decision, while giving weight to the forum selection clause as "prima facie valid,"[11] struck it down as a contract of adhesion for being a product of overreaching, under the *Bremen* standards.

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[9]See *The Bremen*, 407 U.S. at 12-13, footnote 14, citing the dissent of Judge Wisdom, in the Court of Appeals, using the praises: "boilerplate language" and "no power to alter."

[10]The California Court of Appeals cited *Shute, supra*, 897 F.2d at 389, quoting *The Bremen, supra*, 407 U.S. at 18.

[11]See Pet. App. 8a.

And while this Court, in *Stewart Organization, Inc. v. Ricoh Corp.,* 108 S.Ct. 2239 (1988), agreed with the Eleventh Circuit that the *Bremen* standards (forum selection clause enforceable only if reasonable and just or not invalid for no fraud or overreaching),[12] were instructive, in a federal procedural law dispute, Mr. Justice Kennedy, in his concurring opinion, "observed that enforcement of *valid* forum selection clauses, *bargained for* by the parties, protects their legitimate expectations and furthers vital interests of the justice system." (Emphasis supplied.) *Id.* at 2249.

B. The Cases Decided By The First, Second, Third, Fourth and Fifth Circuits Are Factually Distinguishable, Involved Contractual Limitations Period, And Were Decided On A Case-By-Case Basis Due To Differing Circumstances.

The First Circuit, in *DeNicola v. Cunard Line Ltd.,* 642 F.2d 5 (1981), a case of first impression[13] concerning time limitation for commencing suit, affirmed the grant of summary judgment, on the facts[14] of the case, because "the defendant had done all it reasonably could to warn of both their existence and their importance." *Id.* It then articulated the "reasonable notice" standard in *Shankles v. Costa Armatori, S.P.A.,* 722 F.2d 861 (1983), another time limitation case, with the warning that "(d)iffering circumstances may render the same ticket binding on one

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[12] *Id.* at 2243, footnote 7.

[13] *Id.* at 7.

[14] *Id.* at 11. The First Circuit concluded that: "These facts reinforce our conclusion that the one-year limitation operates to bar the plaintiff's suit, even if her lack of knowledge of that provision is assumed."

passenger in one case, yet invalid as against another passenger in another case." *Id.* at 864.

The Second Circuit, in *Spataro v. Kloster Cruise, Ltd.*, 894 F.2d 44 (2nd Cir. 1990), also a case involving contractual limitations period, interpreted *Silvestri v. Italia Societa Per Azioni Di Navigazione,* 388 F.2d 11 (2d Cir. 1968) to require compliance with the "reasonable communicativeness" standard. *Id.* at 46.

The Third Circuit, in *Marek v. Marpan Two, Inc.,* 817 F.2d 242 (3rd Cir. 1987), in another time limitation case, a matter of first impression, adopted the "standard of reasonable communicativeness" to the facts of the case. *Id.* at 245.

The District Court, in *Catalana v. Carnival Cruise Lines, Inc.,* 618 F.Supp. 18 (D.C. Md. 1984), aff'd, 806 F.2d 257 (4th Cir. 1986), in still another contractual limitations case, granted the motion to dismiss because "(t)here is little more that the defendant could have done to call the contract conditions to the attention of the passengers and to impress upon them their importance." *Id.* at 618 F.Supp. 24.

And the Fifth Circuit, in *Carpenter v. Klosters Rederi,* 604 F.2d 11 (5th Cir. 1979), still another time limitation case, applied the "adequate notice" principle to the facts of the case. *Id.* at 13.

Only *Hodes v. S.N.C. Achille Lauro Ed Altri-Gestione, supra,* decided by the Third Circuit, involved the enforcement of a foreign forum selection clause. After finding that "the foreign forum selection clause was reasonably communicated to the Hodeses,"[15] the Third Circuit gave

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[15]The Court applied the reasonable communicativeness test enunciated in *Marek, supra. Id.* at 910.

the reason why the question of enforcement of a foreign forum selection clause is more complex, that is, there is "no statutory provisions govern(ing) foreign forum selection clauses, "unlike clauses involving time limitation, governed by 46 U.S.C. App. of 183b." *Id.* at 912, footnote 3.

More important, the Third Circuit in *Hodes,* in fact, applied the *Bremen* standards. *Id.* at 912-913, 915-916. Although it reached a different result from that of the California Court of Appeal in this case, the Third Circuit found that the "cruise took place in Italy," the place "where performance occurred," and that "the practicalities of litigation weigh in favor of the Neapolitan forum." *Id.* at 916.

The Seventh Circuit, in *Northwestern Nat. Ins. Co. v. Donovan,* 916 F.2d 372 (7th Cir. 1990), in acknowledging "a tension between (its) approach and that of the Ninth Circuit in *Shute, supra,* stated that the "facts were special" in *Shute. Id.* at 376. It warned that enforcement of forum selection clauses may have "adverse effects on third parties." *Id.* Indeed, there are interests of persons or entities not parties to the passenger ticket contracts that would be injured by a change of venue to Florida in this case. They are defendants DOES 1 to 100 impleaded by the respondents in *Secard,* who are presumably California residents.

C. This Is Not An Appropriate Case For Resolving The Issue Presented.

The California Court of Appeals in this case, the Third Circuit in *Hodes*, and the Seventh Circuit in *Northwestern Nat. Ins. Co.,* all applied the *Bremen* standards in analyzing the enforceability of the forum selection clauses on a case-by-case basis. The tensions in approaches or differ-

ences in the appreciation of special facts by the Circuits are probably unavoidable, in view of exceptional cases, like this case of respondents in *Secard.*

Indeed, two hundred forty-four passengers filed their suits in the home port or cruise situs of the M/V TROPICALE. The six (6) respondents in *Secard* are all residents of Southern California, and were treated for soft-tissue injuries by physicians in Southern California. They had no knowledge of the forum selection clause until the transactions were complete. The performance of the cruise occurred in the Port of Los Angeles. Respondents in *Secard* would be physically and financially incapable of pursuing their soft-tissue injury action against petitioner in Florida.

Petitioner has not pointed to other suits filed in other forums as a result of this Voyage 4804 of the M/V TROPICALE in January, 1988, the subject-matter of this case. It is not defending multiple claims in multiple forums.

CONCLUSION

The petition for certiorari should not be granted.

Respectfully submitted,

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(3)

No. 90-1222

Supreme Court, U.S.
FILED
MAR 12 1991
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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
MILDRED WILLIAMS, et al.,
Respondents.

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
ANTOINETTE SECARD, et al.,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second District, Division 3

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

Is a non-negotiable forum selection clause in a passenger ticket contract for a California round-trip cruise enforceable under federal maritime law in the factual context of this case where:

1. More than 200 respondents, close to two-thirds of whom are California residents, desire to litigate against petitioner and other defendants in the cruise venue, whereas the venue specified in the forum selection clause has no logical or reasonable connection whatsoever with the cruise situs or the venue where many of the allegedly tortious and injury causing acts and omissions took place;

2. The respondents had no knowledge of the forum selection clause prior to purchasing the tickets, many respondents received their actual tickets less than 24 hours prior to the cruise departure, and some respondents never received a ticket at all;

3. Enforcement of the forum selection clause would result in grave difficulty and inconvenience, effectively depriving the respondents of their day in court; and

4. Viewing the totality of the ticket provisions, the forum selection clause and other clauses are the product of overreaching and are violative of the provisions of 46 U.S.C. § 183c.

LIST OF PARTIES

Petitioner is Carnival Cruise Lines, Inc. There is no parent company or subsidiary (other than wholly owned subsidiaries) to be listed pursuant to Rule 29.1.

Respondents are the Superior Court of the State of California for the County of Los Angeles, and, in the *Williams* action, the following two hundred thirty-eight plaintiffs:

Mildred Williams
Amy Barta
Nancy Benton
Don Benton
Mary Benton
Rich Backman
Knesta Backman
Marjory B. Bailey
J. Lynn Baker
Duane Baker
Richard Bales
Cindi Bales
Inez Barnett
Cindy Barnett-Levy
Amy Barta
Lily Bash
Juanita Teresa Beardow
Daren Berkett
Ken D. Beto
Dayma Bold
Ella Brocksieper
Jane Buckingham
Bill Buckingham
Dave Burris
Peter Bussee
Donna Bussee
Peter and Donna Bussee as Guardians ad Litem for Trish Bussee, a minor; and Steve Bussee, a minor
Vera Butler
Judd Carder
Jayne Cohen
Phillip Cohen
Robin Chow
George Chow
Robin Chow and George Chow as Guardians ad Litem for Christopher George Chow, a minor; and Jaime Rochelle Chow, a minor
Irene Conroy
Ed Conroy
Raymond Costales
Mary Ann Costales
Alberta Crawford
June Curtis
Jim Cusak
Arion Cusak
Clifford Dalton
Donna Dalton

Clifford Dalton and Donna Dalton as Guardians ad Litem for Jason A. Dalton, a minor
Joanne D'Orazi
Rick D'Orazi
Thomas D'Orazi
Theodora D'Orazi
Arlene Delehart
Kelly Derharootunian
Michael Dillon
Kris Dillon
Patricia Dolan
Jack Eva
Janet Eva
George Fischer
Patricia Fischer
Glenn Federowich
Cindy Federowich
Teresa Felski
Frances Fishman
Gilbert Flores
Lola I. Flores
Richard Foley
Lisa Gallagher
Jim Gausch
Charlene Gausch
Philip T. George
Martha J. George
Darlene Gibson
Dianna Gilbert
David Golchehreh
Suzanne Golchehreh
David Golchehreh and Suzanne Golchehreh as Guardians ad Litem for Leila Golchehreh a minor; and Lawdan Golchehreh, a minor
Bernice Goldrup
Leon E. Grossman
Wanda J. Grossman
Frankie Halford
Less Halford
James Hammerstone
Lana Hammerstone
Sigrid Hann
Marvis Haro
Barbara Heide
Lewis Heide
Georgia Herr
Vivian E. Hall
Carolyn Hongola
Mary Hurst
Barbara Jeffries
Ray Jeffries
Dale B. Johnsen
Elizabeth Johnsen
Connie Juarez
Mathew Kearney
Alice Kearney
Phyllis Keene
John Keene*
Patricia A. Kendrew
Kenneth Kessler
Bessie Kessler
Julie Klenner
Marilyn Koper
John H. Korte, III*

---

* recently deceased

Connie Kramer
Ira Kramer
Norbert F. Kroeger
Arleen E. Kroeger
David Kuba
Jill Kuba
Tom Langusch
Rose Lantz
Tom Laster
Paul Leeder
Mary Jo Leeder
Leanne Leeder
R. L. Lehman
Lois Lehman
Linda Leveque
Jerry Lindan
Anthony Lore
Sherry Lore
Dean Mack
Vickie Mack
Jose Maldonado
Carmen Maldonado
Sadie McPhee
Clarence Mitchell
Betty Mitchell
Wallace Mitchell
Almina Mitchell
Jeffrey Moore
Essie Moore
George Munson
Margaret Munson
Thomas P. Murphy
Sharon J. Myers
Robert Myers
Arlene Myers
Ray Nicol
Christine Nicol
Peter Nitoglia
Melissa Nitoglia
Edward Odian
Diane Odian
Dale Osterbuhr
Edith Osterbuhr
Duane W. Owens
Charles Packett
Betty K. Pearce
Harold Pennington
Pauline Pennington
John Peters
Margie Peters
Cecilia Peterson
Donald Peterson
Virginia Peterson
Larry Pfost
Pat Pfost
Blanche Protz
Mel Provencio
Rachel F. Provencio
Arthur Provost
Pat Quintrell
Ed Quintrell
Alexander M. Reeves
Elizabeth Reinholdt
Peter Ressler
Vanessa Ressler
Robert Reynolds
Carole Reynolds
Vivian Risner
Joseph Saba
Annette Saba
Robert Rowe
Julie Ann Rowe
Roberta N. Rowlands
Harriet Schindele
Deanna K. Schmidt
David Schneer

Kathleen Schneer
Ann Schroeder
Charles Schroeder
Patrick M. Shea
Linda Sheehy
John Sims
Cindy Sims
Ella Smethurst
Geoffry S. Smith
Jean Smith
John Sobieski
Mildred E. Sobieski
Roderick Sparks
Teresita Sparks
Ernest H. Sprague
Lynne Spuhler
Edward Stauber
Max Steinberg
Roslyn Sternfeld
Wendy Strickler
Donna Strickler
Dean Sybrant
Eileen Sybrant
Robert Sybrant
Nadeane Thomas
Cliff Tipping
Dorothy Tipping
Leonard M. Tolvo
John Torrey
Jeanette Torrey
Dan Tyransky
Ellen Tyransky
Mary Van Barneveld
Harry Venger
Ethel Venger
Harry Vento
Rita Vento
Elizabeth Vots
Verne Pennell
Rhonda Voci
Lillian Voss
Robert E. Waterman, Jr.
Steve Watson
Shirley Watson
Natalie Weill
Irving Weili
Frankie Welcome
Les Wetherbee
Shirley Wigge
Gerda Wohlau
Fred Wohlau
Mark Wright
Eileen Wright
Dorothy Wright
Claude Wright

The six additional respondents in the *Secard* action are:

Antoinette Secard, Ed Secard, Fred Secard, George Secard, Joan K. Secard, and Diana J. Fowler.

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In the Supreme Court

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OCTOBER TERM, 1990

No. 90-1222

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
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Respondents.

CARNIVAL CRUISE LINES, INC.,
Petitioner,

VS.

SUPERIOR COURT OF THE STATE OF CALIFORNIA,
for the County of Los Angeles,
ANTOINETTE SECARD, et al.,
Respondents.

On Petition for a Writ of Certiorari to the California Court of Appeal, Second District, Division 3

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

STATEMENT OF THE CASE

This case involves in excess of 200 respondents, passengers on what was expected to be a "pleasure cruise," who seek to litigate against petitioner and numerous other defendants, on various legal theories, in the cruise venue

and in the venue where many of the alleged tortious and injury producing acts and omissions took place. The multiple defendants are all alleged and believed to be subject to the *in personam* jurisdiction of the California courts.[1]

The Statement of the Case appearing at pages 3-5 of the Petition is perceived by respondents to be misleading only by virtue of its complete omission of numerous facts essential to the determination of the enforcement of the forum selection clause under the facts of this case.[2] The Factual and Procedural Statement contained in the Opinion below (Pet. App. 2a-8a) does present a summary of relevant facts ignored by petitioner. Thus, respondents Mildred Williams, et al. respectfully incorporate by reference said portion of the Opinion below. This will serve to supplement the incomplete and selective recitation of the factual record contained in the petition and provide the Court with a more complete picture of the facts of this unique case.

SUMMARY OF ARGUMENT

1. The recent grant of certiorari in *Shute* (No. 89-1647) does not add to the reviewability of the question raised in the unique factual context of this case.

2. The petition should not be entertained because the decision of the Court of Appeal below is correct. The ultimate determination as to whether to enforce a forum selection clause must necessarily turn on the application of guiding federal law to the particular facts of each case.

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[1] The First Amended Complaint for Damages is reproduced at App. A-1–A-28. Todd Pacific Shipyards, Inc. has been dismissed.

[2] *See* Declarations of Donna Silver, reproduced at App. A-29–A-35.

No authority whatever exists for creating an exception to the well-settled rule of thorough case by case analysis in this area of the law.

3. The decision of the Court of Appeal below is in complete conformity with the law as established by the Court and with applicable federal statutes.

4. The petition should not be entertained because the claimed direct conflicts in results between the courts are illusory.

5. The petition should not be entertained because the issues raised by the petition, necessarily limited to the unique facts of this case, are not of sufficient importance to warrant consideration by the Court.

REASONS FOR DENYING THE WRIT OF CERTIORARI

I.

THE COURT'S RECENT GRANT OF CERTIORARI IN *SHUTE* (89-1647) DOES NOT PROVIDE SUPPORT FOR GRANTING THE WRIT IN THIS DISTINGUISHABLE CASE.

Petitioner's attempt throughout the petition to inextricably tie this case to that of *Carnival Cruise Lines, Inc. v. Shute* (No. 89-1647) must be viewed with scrutiny. Although this case and *Shute* involve the same forum selection clause, different issues relevant to its enforcement are raised in the two cases precisely because of the distinguishable factual contexts within which the clause must be considered. While respondents respectfully submit that the Ninth Circuit Court of Appeals correctly refused to enforce the clause in the context of the *Shute* case, 897 F.2d 377 (9th Cir. 1990), this case presents an

even more compelling factual context supporting a refusal to enforce the clause. Several of the more obvious distinguishing factors include the following:

Unlike *Shute,* this case involves hundreds of respondents, close to two-thirds of whom are California residents, seeking to litigate against multiple defendants in the cruise venue itself. Respondents' desire to pursue this action in the venue from which the cruise departed and to which it returned, in the venue of contract performance, and in the venue where allegedly tortious conduct took place in connection with preparing the vessel and its crew for a safe departure and journey, distinguishes this case from *Shute* and from every other case that has come before the courts. Respondents' desire to litigate in the most reasonable choice of venue raises even further concerns as to the unreasonableness of petitioner's unbargained-for selection of a forum for litigation bearing no connection whatever with the cruise venue. To enforce the clause under these circumstances would be manifestly unjust.

This case raises different issues in connection with whether or not the respondent passengers can be found to have been given reasonable notice of the forum selection clause in the first place. Not a single respondent was provided with pre-booking literature or literature accompanying his or her ticket which alerted the passenger to the existence of the forum selection clause. At least 50 respondents did not receive their tickets until actual embarkation or shortly before; at least five received boarding passes only; and at least 63 respondents received their tickets from 24 to less than 96 hours before departure.[3] Only one respondent contends to have been

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[3] *See* Pet. App. 2a-8a; App. A-30–A-32.

aware of the clause prior to departure and he, together with all but a few respondents, did not have cancellation insurance relieving him of the cancellation charge to which all ticket-carrying respondents were subject had they sought to cancel their tickets upon learning of the existence of the clause.[4]

The refusal to enforce the forum selection clause in this case also rests upon the *independent* basis that enforcement of the clause in this particular factual context would effectively deprive respondents of their day in court and allow petitioner to use the clause as a complete shield from liability.[5] As summarized by the court below:

> "At least 30 plaintiffs asserted they are physically unable to travel to Florida due to age and medical problems. At least one-half of the remaining plaintiffs would suffer hardship and inconvenience due to health and medically related problems, dependency of minors and other family members, and work commitments. At least 145 plaintiffs, over one-half of all plaintiffs in *Williams*, contend they are financially unable to pursue their action in Florida." (footnote omitted) Pet. App. 5a.

The foregoing illumination of some of the distinguishing facts underscores the need for case by case determination consistent with the principles set forth in

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[4]If, as is stated, in *Hodes v. S.N.C. Achille-Lauro Ed Altri-Gestione*, 858 F.2d 905, 911 (3rd Cir. 1988) *cert. dismissed*, 490 U.S. 1001 (1989), "The essential injury remains whether the ticket reasonably communicated to the passengers the conditions of the contract *before* the passenger boarded the vessel," the realities of the circumstances in this case require this inquiry to be answered resoundingly in the negative.

[5]Pet. App. 10a; App. A-32–A-33.

M/S BREMEN v. Zapata Off-Shore Co., 407 U.S. 1 (1972), ("*The* BREMEN"). *The* BREMEN holds that a negotiated forum selection is *prima facie* valid and enforceable under federal maritime law *unless*, it is shown to be " 'unreasonable' under the circumstances" or violative of important public policy. A forum selection clause will be set aside if it is clearly shown to be invalid as the result of fraud, overreaching, or "overweening bargaining power," *or* if it is shown that enforcement of the clause would be so "manifestly and gravely inconvenient that it would effectively deprive the litigants of their day in court." *The* BREMEN, 407 U.S. at 5, 10, 12, 15, 18-19.

Petitioner argues that the guiding principles set forth in *The* BREMEN apply (Pet. at 6-9), yet petitioner ignores that applying the holding and reasoning of the Court in *The* BREMEN to these facts compels a refusal to enforce the clause. The Opinion below is firmly grounded in two of the alternative grounds established in *The* BREMEN as legitimate ones for refusing to enforce a forum selection clause. Pet. App. 9a; 10a. The Court of Appeal's decision is thus justified under either of these grounds independent of the other.

It appears that petitioner is, in reality, seeking a rule that would *preclude* full consideration, on a case by case basis, of *all* the relevant considerations as set forth in *The* BREMEN.[6] Such a rule would place petitioner above

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[6]Petitioner apparently advocates a rule that the determination as to whether or not to enforce a boilerplate, non-negotiable and even unreasonable forum selection clause begins and ends with a finding, as a matter of law, that the clause was "reasonably communicated" to the passengers, based only on the physical characteristics of the ticket, and thus conclusively binding upon them irrespective of any other compelling factors. See Pet. at 9-11; 13. A number of the cases relied upon by petitioner, including *Hodes, supra*, 858 F.2d 905, have

established principles of contract law and federal maritime law and ensure insulation from further challenge by injured passengers. It is respectfully submitted that there is no justification, in law or policy, for the creation of this exceptional place in the law for Carnival Cruise Lines, Inc.

II.

THERE IS NO DIRECT CONFLICT BETWEEN THE DECISION OF THE CALIFORNIA COURT OF APPEAL, WHICH FOLLOWS *The* BREMEN, AND THE ALLEGEDLY CONFLICTING DECISIONS UPON WHICH PETITIONER RELIES.

Every single allegedly conflicting decision upon which petitioner relies was decided in a factual context significantly distinguishable from that of this case. While respondents concede that there may be a tension, and even a conflict, between the reasoning of the Court of Appeal and other courts in the approach to determining enforcement of such a clause, this tension need not necessarily lead to a conflict in ultimate decision or result.[7] A careful

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applied a "reasonable communication" standard as a basis, in whole or in part, for enforcing various adhesive clauses. It is submitted that this application has led to conclusions, in the forum selection clause cases, that are incompatible with conclusions that would result had the guidelines and considerations set forth in *The* BREMEN been those to which the courts had adhered. The conclusions reached ignore the realities of the transactions and circumstances involved. See Note 4, *supra*.

[7]For example, the Seventh Circuit recently acknowledged a "tension" between its approach and that of the Ninth Circuit in *Shute*, *supra*. In *Northwestern Nat. Ins. Co. v. Donovan*, 916 F.2d 372, 376 (7th Cir. 1990), the court recognized that these cases turn on their own facts and that in *Shute*, "the facts were special." The court distinguished *Shute*, stating: "If ever there was a case for stretching

analysis of the decisions allegedly in "direct conflict" with that of the court below reveals that had the other courts been confronted with these facts, and/or fully applied the considerations outlined in *The* BREMEN, rather than basing a result solely on the physical characteristics of the ticket, they too would have reached the same result and refused to enforce the clause in the context of this case.

Petitioner relies largely upon cases that reach a holding solely after considering only the limited issues of "reasonable communication" or "reasonable notice" to the passengers of the contract terms.[8] These decisions, which do not confront and/or fully consider all of the issues relevant to enforcement of a forum selection clause under *The* BREMEN, do not present any conflict, direct or indirect, with the decision below which firmly rests upon the *independent* finding of grave difficulty and inconvenience to respondents. This ground alone justifies the court's refusal to enforce the clause, irrespective of whether or not the clause was found to be invalid as the product of overreaching under the facts of this case.

Thus, there is no square conflict between the Opinion below and any other decision containing a thorough consideration of all issues relevant to enforcement of a forum

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the concept of fraud in the name of unconscionability, it was *Shute*, and perhaps no stretch was necessary."

[8]See Pet. at 7; 9-11; 13; However, even some of these cases recognize the need for case by case determination. For example, in *Shankles et al. v. Costa Armatori, S.P.A., et al.*, 722 F.2d 861, 864-865. (1st Cir. 1983), which does not deal specifically with a forum selection clause, the court observed that "[d]iffering circumstances may render the same [unbargained for term or condition of a contract of passage] binding on one passenger in one case, yet invalid as against another passenger in another."

selection clause under applicable federal maritime law principles. The court below properly refused to enforce the clause which is in violation of federal statutory law.

A. The Decision Of The Court Of Appeal Below Is Consistent Both With Federal Maritime Law Principles Established In *The* BREMEN And With Federal Statutes.

The BREMEN involved an international towage contract which the Court importantly found to be a "freely negotiated private international agreement, unaffected by fraud, undue influence or overweening bargaining power." 407 U.S. at 12. The Court emphasized that, "The choice of the forum was made in an arms-length negotiation by experienced and sophisticated businessmen, . . ." *Id.* Thus, the existence of a freely negotiated contract between two competent parties lies at the very heart of *The BREMEN:*

> "There is strong evidence that the forum selection clause was a vital part of the agreement, and it would be unrealistic to think that the parties did not conduct their negotiations, including fixing the monetary terms, with the consequences of the forum selection clause figuring prominently in their calculations. *Under these circumstances* . . . '[t]he force of an agreement for litigation in this country, freely entered into between two competent parties, seems to be very powerful.' " (emphasis added) *Id.* at 14.

The boilerplate, non-negotiated maritime contract of adhesion involved herein does not carry the same force. There is no evidence in the record below that a single respondent had the opportunity to review, much less negotiate, a single term of the passenger ticket contract including its forum selection clause provision prior to

paying for his or her ticket in full. There is no evidence that a single respondent received any consideration whatever, in the form of a reduced ticket price or otherwise, for relinquishing his or her right to litigate in a venue bearing a reasonable and logical connection with the cruise itself. There is no evidence that a single respondent contemplated having to travel to Florida to litigate disputes arising out of a California cruise when he or she purchased the ticket. There is no reason why petitioner should not be reasonably expected to defend possible litigation in the small number of venues, including this venue in California, from which petitioner's vessels regularly made their round-trip vacation voyages.

In recognition that *The* BREMEN sets forth compelling guidelines, at least as to negotiated forum selection clauses in maritime commercial contracts, the court below applied the considerations established in *The* BREMEN to the subject maritime contract in the factual context of this case. The court below properly found the forum selection clause to be invalid as the result of "untenable 'overreaching' by Carnival." Pet. App. 10a; *The* BREMEN, 407 U.S. at 15. The court further found that under the circumstances, enforcement of the clause would effectively deprive respondents of their day in court. Pet. App. 10a; *Id.*, at 18-19.

46 U.S.C. § 183c provides that it is unlawful for vessel owners:

> ". . . to insert in any . . . contract, or agreement, any provision or limitation . . . purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction on the question of liability for such loss, or injury, or the measure of damages therefor. All such provisions or limitations contained in any such . . . contract, or agreement are

> declared to be against public policy and shall be null and void and of no effect."

The subject forum selection clause purports to do exactly that which is declared unlawful by this federal statute. Viewing the totality of the provisions in Carnival's ticket, the forum selection clause is not the only example of impermissible overreaching on the part of petitioner. Clauses 3(b) and 4 of the 19 clauses, for example, seek to relieve petitioner from liability for its own negligence and that of its agents. These clauses respectively provide in part:

> "3. (b) The passenger admits a full understanding of the character of the Vessel and assumes all risk incident to travel and transportation and handling of passengers and cargo. . . .
>
> "4. The Carrier shall not be liable for any loss of life or personal injury or delay whatsoever, wheresoever arising and howsoever caused even though the same may have been caused by the negligence or default of the carrier or its servants or agents. . . ."

Such a disclaiming clause has been held to be contrary to federal maritime law, and has been declared to be null and void. *See Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334-1335 (11th Cir. 1984). It is only by virtue of the unequal bargaining position of the parties that petitioner continues to insert the forum selection clause and these other clauses in its passenger ticket contracts — irrespective of federal law and policy and irrespective of the cruise venue itself.[9]

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[9]Refusal to enforce the forum selection clause in this case is also consistent with analogous cases interpreting forum selection clauses in bills of lading under the provisions of the Carriage of Goods By Sea Act (COGSA), 46 U.S.C. 1303(a). *See Indussa Corp. v. S.S.*

The forum selection clause cases allegedly in direct conflict with the decision below do not confront the effect of federal statute. The Third Circuit in *Hodes, supra,* 858 F.2d 905, 914, did, however, suggest that the provisions of 46 U.S.C. 183c may apply to bar enforcement of a forum selection clause under the facts of this case, which unlike *Hodes,* does *not* involve an entirely foreign voyage: "[Plaintiffs] might . . . construct an . . . argument on the basis of [that federal statute] . . . . But the provisions of Section 183c . . . are limited in application to voyages that touch the United States."

B. The Decision Of The Court Of Appeal Is Not Directly In Conflict With Other Decisions From The First, Second, Third, Fourth, Fifth, And Sixth Circuits.

None of the allegedly conflicting cases upon which petitioner relies, specifically involving enforcement of forum selection clauses, are substantially indistinguishable factually from this case. For example, in *Everett v. Carnival Cruise Lines,* 677 F.Supp. 269, 270-272 (M.D. Pa. 1987), the court emphasized that the passengers therein received their tickets two or three weeks prior to departure, and "had their tickets well in advance of when the cruise began." The same cannot be said herein, where at least 44 respondents received their tickets upon actual embarkation of the vessel on January 17, 1988; at least five respondents received boarding passes only and no ticket at all; and at least six other respondents received their tickets on the day of departure, four of whom received their tickets two hours prior to embarkation. At

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Ranborg, 377 F.2d 200, 203-204 (2d Cir. 1967); *Pacific Lumber & Shipping Co. v. Star Shipping A/S,* 464 F.Supp. 1314, 1315 (W.D. Wash. 1979); and *Mitsui & Co. Limited v. M/V GLORY RIVER,* 464 F.Supp. 1004, 1005 (W.D. Wash. 1978).

least four respondents received their tickets the day before the cruise and many others received them a mere 24 to 96 hours before departure. Whereas in this case only one respondent out of hundreds was aware of the clause prior to departure, in *Everett*, "plaintiffs [did] not contend they were not actually aware of the ticket's venue limitation provisions." *Id.* at 272. While petitioner herein suggests that respondents could have obtained a copy of the ticket in advance of purchase (Pet. at 13), the evidence is that at least 62 respondents could not even obtain their tickets from petitioner in a timely fashion *after* payment in full. App. A-31.

While petitioner argues that some other courts have shown no reluctance to enforce contracts of adhesion (Pet. at 11), the fact remains that neither the Third Circuit in *Hodes, supra*, 858 F.2d 905 nor the "numerous district courts" to which petitioner refers (Pet. at 7, note 13) confront or address the enforcement of a forum selection clause wherein the forum specified has no logical or reasonable connection with the cruise venue and the passengers desire the litigation to be pursued in the same venue from that which the cruise departed and returned. The inherent appropriateness of refusing to enforce an unreasonable forum selection clause under such circumstances was even recognized by the Third Circuit in *Hodes*: "The choice of an Italian venue for disputes arising out of a cruise on an Italian cruise vessel, departing and returning to Italy, was a sensible and fair choice. [citation] Indeed, it was the most reasonable choice of venue, if a choice was to be made." "... Italy is where performance occurred and where [defendants] allegedly failed to provide adequate security." *Id.* at 913, 916. Given this reasoning, it is doubtful that the Third Circuit would find that petitioner herein "exercised a reasonable choice in selecting a venue" (*Id.*) that has nothing

whatever to do with the situs of the cruise and location of contract performance.

The other cases involving forum selection clauses upon which petitioner relies involve one or two passengers (not hundreds) suing a single cruise line defendant (not multiple defendants on various legal theories) in a venue *unrelated* to the departure situs of the cruise and unrelated to the forum where alleged tortious acts occurred. In *Luby v. Carnival Cruise Lines, Inc.*, 1986 A.M.C. 2326 (D.Md. 1985), the Florida forum selection clause was found to be enforceable in connection with cruises that departed from and returned to Florida. In *Everett, supra*, 677 F.Supp. 269, the plaintiffs sought to litigate against Carnival in Pennsylvania, clearly not the cruise situs. In *Wilkinson v. Carnival Cruise Lines, Inc.*, 645 F.Supp. 318 (S.D. Tex. 1985), an Oklahoma resident sought to litigate against Carnival in Texas, arising out of a California round-trip cruise. In *Hollander v. K-Lines Hellenic Cruises, S.A.*, 670 F.Supp. 563 (S.D.N.Y. 1987), a forum selection clause requiring suit to be brought in Piraeus, Greece was enforced in connection with a cruise that departed to and returned from Piraeus. In *Walker v. Carnival Cruise Lines, Inc.*, 681 F.Supp. 470 (N.D. Ill. 1987), the plaintiff sought to litigate her claim against Carnival in Illinois, arising out of a Florida round-trip cruise. Similarly, in *Catalana v. Carnival Cruise Lines*, 618 F.Supp. 18 (D.Md. 1984), *aff'd*, 806 F.2d 257 (4th Cir. 1986), residents of Maryland and passengers on a Florida round-trip cruise sought to litigate against Carnival in Maryland. Furthermore, the court's abbreviated and incomplete analysis of enforcement of the forum selection clause therein is dicta; the holding of the opinion rests upon the personal jurisdiction issue and the bar imposed by the contractual limitations clause.

All of the other decisions issuing from the courts of the First, Second, Third, Fourth, Fifth and Sixth Circuits alleged by petitioner to be directly in conflict with the decision below do not even specifically involve the enforcement of forum selection clauses. (Pet. at 7, note 12; 9-10; notes 16-17.) These cases, from *Shankles, supra,* 722 F.2d 861 (1st Cir. 1983) to *Carpenter v. Klosters Reederi A.S.,* 604 F.2d 11 (5th Cir. 1979) and *Barbachyn, et al. v. Costa Line, Inc., et al.,* 713 F.2d 216 (6th Cir. 1983) confront *not* the question of enforcement of forum selection clauses, which involves the unique consideration of factors outlined in *The* BREMEN, but rather the enforcement of contractual time limitations provisions for bringing suit. One year statutes of limitations, and even six months claim statutes, are far from uncommon in the legal system. It is respectfully submitted that most injured persons are aware that they do not have unlimited time within which to bring a claim and/or suit against another party. Viewing the reasonableness of unbargained-for forum selection clauses, including the financial burdens, hardships and unforeseen inconveniences which they impose on the passengers and the extent of the rights which they unilaterally take away from the ticket purchaser, as compared to the reasonableness of one year contractual limitations provisions, different conclusions are appropriate. Furthermore, as discussed *supra,* forum selection clauses do not enjoy the legislative approval accorded to one year limitations for suit and six-months claims limitations provisions in connection with seagoing vessels transporting passengers. *See* 46 U.S.C. § 183b(a).

Respondents question the propriety of blanket application of the "reasonable communication" or "reasonable notice" standards adopted in these non-forum selection clause cases as *the* basis for determining the enforcement of a boilerplate and unreasonable forum selection

clause.[10] As exemplified in *The* BREMEN, the approach to the enforcement of forum selection clauses in maritime contracts requires and warrants a special consideration of factors and policy concerns. As acknowledged by the First Circuit in *Shankles, supra,* 722 F.2d 861, 865, in connection with a contractual limitations clause: "Although a passenger may almost never read all of the fine print on the ticket upon purchase, or as pleasure reading in the berth the first night at sea, the same passenger might well be expected to consult the multifarious terms and conditions of the ticket/contract in the event of an accident resulting in loss or injury." This post-cruise departure reading would allow an injured passenger to timely comply with a contractual limitations provision. It would not, however, restore an injured passenger's right to litigate in reasonable venue — in this case, a right that was unknowingly relinquished as a result of petitioner's overreaching.

C. This Is Not An Appropriate Case For The Grant of Certiorari.

The facts of this case are unique. As discussed *supra,* not a single case has come before the courts with this large number of respondents, with allegations against multiple defendants, who seek to litigate in the cruise venue. Principles of judicial economy require that this case be litigated in the California forum where suit was filed. It is highly doubtful that defendants other than petitioner would be subject to the *in personam* jurisdiction of a court sitting in Florida. See *Alexander Proudfoot Co. World Headquarters L.P. et al. v. Thayer,* 877 F.2d 912 (11th Cir. 1989).

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[10] *See* note 6, *supra.*

Not a single respondent is a resident of Florida and not a single respondent traveled to Florida for the subject cruise. Of these at least 30 respondents contending that they are physically incapable of traveling to Florida, health problems including coronary and pulmonary conditions and M.S. are specified. Of the remaining respondents physically capable of traveling to Florida, at least one-half would not undertake such trip(s) due to the overwhelming difficulties and inconveniences of caring for others dependent upon them for care, such as small children and senile or incapacitated family members. Others could not travel to Florida due to problems associated with single parenting, work commitments and fear of unemployment in these depressed times. At least 145 respondents contend they are financially incapable of pursuing this litigation in Florida.[11]

Almost two-thirds of respondents are California residents. Health care providers and other potential damages witnesses in California are a significant consideration. Close to one-half of the non-California resident respondents are from the western states.[12] Pretrial discovery in connection with these respondents would similarly be more inexpensively and conveniently pursued from California than from Florida.

Petitioner cavalierly argues that respondents can meet the increased financial and physical burden of litigating this action in Florida. For the majority of respondents, a significant portion of any damages they may recover in this litigation would be consumed by the travel expenses associated with travel to Florida for discovery and/or trial, and the additional expenses for accommodations

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[11] *See* App. A-10; A-32–A-33.

[12] App. A-10; A-30.

and substitute care for dependents at home. Contrary to petitioner's assertions, respondents have no "resources" to "pool together" (Pet. at 15) so as to render litigation in Florida anything less than insurmountably difficult and severely impractical. The burden of bearing the costs of this litigation as incurred falls upon respondents' counsel. If the forum selection clause is enforced in this case, petitioner may succeed in depriving respondents of their day in court simply due to the inability to find satisfactory counsel in Florida, with sufficient financial resources to represent them in a forum so distant from where the majority of respondents reside, so distant from where such a large number of damages witnesses are located, so remote from where most of the allegedly tortious acts took place, and in a forum so favorable to petitioner.

Respondents' California counsel are amenable to one or more discovery trips to Florida, San Juan, Puerto Rico or another port from which petitioner now departs, to depose whichever crewmembers are necessary. It would be far less costly to depose and perpetuate the testimony of such persons, who probably number thirty or less, than to employ such procedures for more than 200 respondents and their damages witnesses. The present location of the vessel itself is irrelevant in this case. Since the subject cruise, the M/V TROPICALE underwent repair and refurbishing following significant fire damage.[13] The lay-out of the vessel can certainly be established through blue prints and mock-ups. It is most unlikely that there would be any reason for a "jury view" of the actual vessel (Pet. at 15, note 27), given the vessel's repair and refurbishment since December, 1988.

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[13]App. A-33.

Carnival's cruises do *not* depart from and return to ports all over the globe. The logical venues for litigation against petitioner are defined by the acknowledged *very limited number* of venues from which its round-trip cruises depart and to which they return. Pet. App. 17a-18a. The "certainty and predictability" that petitioner seeks (Pet. at 16) can be achieved by its selection of a forum for litigation that bears a reasonable connection to a given cruise. As long as carriers like petitioner continue to select manifestly unreasonable forums for suit, the issue will, and should, continue to be litigated. Furthermore, because this is an area of the law requiring case by case analysis in conformity with guiding federal principles, it is neither practical nor just for carriers to expect perfect uniformity in decision.

Carnival's fear of the "possibility of related claims being brought in various jurisdictions" (Pet. at 17) does not justify the grant of certiorari in this case. Petitioner has not invited the Court's attention to any other litigation pending against it in any other forum arising out of this particular cruise voyage and set of facts.[14] The realities are that carriers may sometimes have to defend related claims brought in different jurisdictions. Carriers cannot always enjoy predictability at the complete ex-

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[14]While in some cases, inconvenience to the carrier may result from litigation in multiple venues or in a venue other than that specified in the clause, it is less than genuine for petitioner to make such an argument in connection with enforcement of the clause in the factual context of this case. Petitioner has the resources to hire competent California counsel to defend its interests in this cruise venue. Petitioner can surely do what is practical and economical by having its Florida counsel cover discovery that takes place in Florida, Puerto Rico or San Juan and have its California counsel handle discovery in California, if it does not wish to incur the expense of transporting California counsel to Florida for certain discovery.

pense of justice and the protection of the rights of certain passengers.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

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SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF LOS ANGELES
[Filed on June 7, 1989]

MILDRED WILLIAMS; AMY BARTA; NANCY BENTON; DON BENTON; MARY BENTON; RICH BACKMAN; KNESTA BACKMAN; MARJORY B. BAILEY; J. LYNN BAKER; DUANE BAKER; RICHARD BALES; CINDI BALES; INEZ BARNETT; CINDY BARNETT-LEVY; AMY BARTA; LILY BASH; JUANITA TERESA BEARDOW; DAREN BERKETT; KEN D. BETO; DAYMA BOLD; ELLA BROCKSIEPER; JANE BUCKINGHAM; BILL BUCKINGHAM; DAVE BURRIS; PETER BUSSEE; DONNA BUSSEE; PETER and DONNA BUSSEE as Guardians ad Litem for TRISH BUSSEE, a minor; and STEVE BUSSEE, a minor; VERA BUTLER; JUDD CARDER; JAYNE COHEN; PHILLIP COHEN; ROBIN CHOW; GEORGE CHOW; ROBIN CHOW and GEORGE CHOW as Guardians ad Litem for CHRISTOPHER GEORGE CHOW, a minor; and JAIME ROCHELLE CHOW, a minor; IRENE CONROY; ED CONROY; RAYMOND COSTALES; MARY ANN COSTALES; ALBERTA CRAWFORD; JUNE CURTIS; JIM CUSAK; ARION CUSAK; CLIFFORD DALTON; DONNA DALTON; CLIFFORD DALTON and DONNA DALTON as Guardians ad Litem for JASON A. DALTON, a minor; JOANNE D'ORAZI; RICK D'ORAZI; THOMAS D'ORAZI; THEODORA D'ORAZI; ARLENE DELEHART; KELLY DER HAROOTUNIA; MICHAEL

Dillon; Kris Dillon; Patricia Dolan; Jack Eva; Janet Eva; George Fischer; Patricia Fischer; Glenn Federowich; Cindy Federowich; Teresa Felski; Frances Fishman; Gilbert Flores; Lola I. Flores; Richard Foley; Lisa Gallagher; Jim Gausch; Charlene Gausch; Philip T. George; Martha J. George; Darlene Gibson; Dianna Gilbert; David Golchehreh; Suzanne Golchehreh; David Golchehreh and Suzanne Golchehreh as Guardians ad Litem for Leila Golchehreh, a minor; and Lawdan Golchehreh, a minor; Bernice Goldrup; Leon E. Grossman; Wando J. Grossman; Frankie Halford; Less Halford; James Hammerstone; Lana Hammerstone; Sigrid Hann; Marvis Haro; Barbara Heide; Lewis Heide; Georgia Herr; Vivian E. Hall; Carolyn Hongola; Mary Hurst; Barbara Jeffries; Ray Jeffries; Dale B. Johnsen; Elizabeth Johnsen; Connie Juarez; Mathew Kearney; Alice Kearney; Phyllis Keene; John Keene; Patricia A. Kendrew; Kenneth Kessler; Bessie Kessler; Julie Klenner; John H. Konte, III; Marilyn Koper; Connie Kramer; Ira Kramer; Norbert F. Kroeger; Arleen E. Kroeger; David Kuba; Jill Kuba; Tom Langusch; Rose Lantz; Tom Laster; Paul Leeder; Mary Jo Leeder; Leanne Leeder; R.L. Lehman; Lois Lehman; Linda leveque; Jerry Lindan; Anthony Lore; Sherry Lore; Dean Mack; Vickie Mack; Jose Maldonado; Carmen Maldonado; Sadie McPhee; Clarence Mitchell; Betty Mitchell; Wallace Mitchell; Almina Mitchell; Jeffrey Moore; Essie Moore; George Munson; Margaret Munson; Thomas P. Murphy; Sharon J. Myers; Robert Myers; Arlene Myers; Ray Nicol; Christine Nicol; Peter Nitoglia; Melissa Nitoglia; Edward Odian; Diane Odian; Dale Osterbuhr; Edith Osterbuhr; Duane W. Owens; Charles Packett; Betty K. Pearce; Harold

Pennington; Pauline Pennington; John Peters; Margie Peters; Cecilia Peterson; Donald Peterson; Virginia Peterson; Larry Pfost; Pat Pfost; Blanche Protz; Mel Provencio; Rachel F. Provencio; Arthur Provost; Pat Quintrell; Ed Quintrell; Alexander M. Reeves; Elizabeth Reinholdt; Peter Ressler; Vanessa Ressler; Robert Reynolds; Carole Reynolds; Vivian Risner; Joseph Saba; Annette Saba; Robert Rowe; Julie Ann Rowe; Roberta N. Rowlands; Harriet Schindele; Deanna K. Schmidt; David Schneer; Kathleen Schneer; Ann Schroeder; Charles Schroeder; Patrick M. Shea; Linda Sheehy; John Sims; Cindi Sims; Ella Smethurst; Geoffry S. Smith; Jean Smith; John Sobieski; Mildren E. Sobieski; Roderick Sparks; Teresita Sparks; Ernest H. Sprague; Lynne Spuhler; Edward Stauber; Max Steinberg; Roslyn Sternfeld; Wendy Strickler; Donna Strickler; Dean Sybrant; Eileen Sybrant; Robert Sybrant; Nadeane Thomas; Cliff Tipping; Dorothy Tipping; Leonard M. Tolvo; John Torrey; Jeanette Torrey; Dan Tyransky; Ellen Tyransky; Mary Van Barneveld; Harry Venger; Ethel Venger; Harry Vento; Rita Vento; Elizabeth Vots; Verne Pennell; Rhonda Voci; Lillian Voss; Robert E. Waterman, Jr.; Steve Watson; Shirley Watson; Natalie Weill; Irving Weill; Frankie Welcome; Les Wetherbee; Shirley Wigge; Gerda Wohlau; Fred Wohlau; Mark Wright; Eileen Wright; Dorothy Wright; Claude Wright,

Plaintiffs,

VS.

CARNIVAL CRUISE LINES, INC.,
a corporation; TODD PACIFIC SHIPYARD, INC.,
a corporation; DOES 1 TO 120, Inclusive,
Defendants.

CASE NO.: SOC 96347

FIRST AMENDED COMPLAINT FOR DAMAGES

COME NOW plaintiffs, complaining of defendants, and each of them, and allege as follows:

GENERAL ALLEGATIONS

1. The true names and capacities, whether individual, corporate, associate, or otherwise of defendants DOES 1 to 120, inclusive, and each of them, are unknown to plaintiffs, who therefore sue said defendants by such fictitious names; that plaintiffs will ask leave of Court to amend this pleading to set forth the true names or capacities of said defendants when the same are ascertained by plaintiffs.

2. Plaintiffs are informed and believe and thereon allege that each of the defendants designated herein as a DOE is legally responsible in some manner for the events and happenings herein referred to, and legally caused injury and damage proximately thereby to plaintiffs as herein alleged; that each of the defendants designated herein as a DOE was, and still is, an individual, corporation, or other business entity organized and existing and/or doing business under and by virtue of the laws of the State of California or the various states of the United States, with principal places of business and/or residences in the County of Los Angeles, State of California; that said defendants were and are authorized to do

business in the State of California; and that said defendants regularly conducted business in the State of California.

3. Plaintiffs are informed and believe and thereon allege that defendants, and each of them, are absolutely liable in tort and/or are liable because of injuries and/or are liable due to breach of warranty, express or implied and/or negligence and/or for other reasons any or all of which proximately caused the injuries and damages sustained by plaintiffs as herein alleged, either through defendants' own conduct or through the conduct of agents, servants, or employees, acting within the course and scope of their employment, or due to their ownership, control, possession, manufacture, sale, repairing, inspecting, surveying, supplying, installing, servicing, and entrusting of the vessel M/V TROPICALE, its instrumentalities, and its component parts, or in some other manner.

4. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants, and each of them, were the agents, representatives, servants, employees and/or joint venturers of their co-defendants, and were, as such, acting within the scope, course and authority of said agency, employment and/or joint venture, in that each and every defendant, as aforesaid, when acting as a principal, was negligent in the selection and hiring of each and every other defendant, as an agent, servant, employee and/or joint venturer.

5. Plaintiffs are informed and believe and thereon allege that the acts and conduct of defendants, and each of them, complained of herein occurred within the said County of Los Angeles, State of California, South Judicial District, and at sea in territorial and international waters, arising out of a cruise which originated and

departed from the Port of Los Angeles, in the County of Los Angeles, State of California.

6. Plaintiffs are informed and believe and thereon allege that at all times material herein, CARNIVAL CRUISE LINES, INC., a corporation, was and is a Panamanian corporation with its principal place of business in Miami, Florida; that at all times material hereto said defendant has purposely availed itself of the privilege of conducting economic activities in California, involving the benefit and protection of California's laws; that said defendant has had substantial and continuous contact with California and plaintiffs' claims herein arise out of said defendant's activities in California; that said defendant has been and is registered to do business in the State of California; that said defendant has rented, leased, owned or otherwise maintained property in California, has had employees in California, and has maintained an office at 302 W. 5th Street in the City of San Pedro, County of Los Angeles, State of California; that said defendant has maintained two or more telephone listings in California, at least one of which is a 1-800 number for California residents to call to obtain cruise information; that at all material times hereto said defendant has solicited business in California and has advertised in local publications and provided brochures to travel agents in the State of California, which are in turn distributed to potential customers; that said defendant has paid travel agencies in California a commission on proceeds from tickets sold for Carnival Cruises, including the subject cruise; that at all material times hereto said defendant has regularly operated cruise vessels that have departed from and/or called at the Port of Los Angeles, including the vessel M/V TROPICALE.

7. Plaintiffs are informed and believe and thereon allege that defendant TODD PACIFIC SHIPYARD, INC., a corporation, is a corporation organized and existing under and by virtue of the laws of the State of California and of the various states of the United States, with its principal place of business in the County of Los Angeles, State of California; that said defendant was and is authorized to do and/or doing business in the State of California; and that said defendant has regularly conducted business in the State of California.

8. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, CARNIVAL CRUISE LINES, INC., a corporation, and DOES 1 to 10, inclusive, and each of them, were and still are in the business of owning, operating, chartering, leasing, managing, supervising and otherwise controlling certain vessels of various registry on the high seas and in navigable waters within the territorial jurisdiction of the United States of America.

9. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants TODD PACIFIC SHIPYARD, INC., a corporation; and DOES 11 to 40, inclusive, and each of them, were and still are in the business of constructing, building, servicing, repairing, inspecting, modifying, installing, fabricating, assembling, testing, warranting, and otherwise performing work upon sea going vessels and cruise ships, and each and every component part thereof, and that prior to and on or about January 17, 1988, did perform said work upon the vessel M/V TROPICALE and its component parts.

10. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants DOES 30 to 60, inclusive, and each of them, were and still

are engaged in the business of manufacturing, designing, assembling, modifying, distributing, leasing, buying, selling, inspecting, servicing, repairing, installing, marketing, warranting and advertising sea going vessels and cruise ships, and each and every component thereof, including, but not limited to the port engine and the port stabilizer of the vessel M/V TROPICALE, and the vessel itself.

11. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants, DOES 61-70, inclusive, and each of them, were and still are in the business of providing weather reports and other meteorological services to the owners, operators, charterers, managers or otherwise controllers of sea going vessels and cruise ships originating and departing from the Port of Los Angeles, in the County of Los Angeles, State of California, and did provide such services prior to the departure and during the voyage of the vessel M/V TROPICALE from on or about January 17 through January 24, 1988.

12. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants, DOES 71-90, inclusive, and each of them, were and are in the business of marine surveyors or otherwise surveying and/or inspecting sea going vessels and cruise ships for purposes of ascertaining value, insurability, structural strength and/or safety of said vessel and ships and each and every component part thereof, and did perform such surveying and inspecting services upon the vessel M/V TROPICALE prior to and on or about January 17, 1988.

13. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants DOES 91 to 110, inclusive, and each of them, were and

still are engaged in the business of operating, managing, owning, leasing, or otherwise controlling the port facilities and cruise ship departure facilities located at the Port of Los Angeles, in the County of Los Angeles, State of California, from which the vessel M/V TROPICALE departed on or about January 17, 1988.

14. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants DOES 111 to 120, inclusive, and each of them, were and still are in the business of providing tug boat services to sea going vessels and cruise ships departing from the Port of Los Angeles, and did provide tug boat services and assistance to the vessel M/V TROPICALE as it undertook to depart from the Port of Los Angeles on or about January 17, 1988.

15. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants CARNIVAL CRUISE LINES, INC., a corporation, and DOES 1 to 10, inclusive, and each of them, owned, leased, chartered, operated, managed, supervised and otherwise controlled a vessel designated as the M/V TROPICALE, the exact description of which is unknown to plaintiffs; and plaintiffs will ask leave of Court to amend this pleading when the correct description thereof is ascertained by them.

16. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, CARNIVAL CRUISE LINES, INC., a corporation; and DOES 1 to 10, inclusive, and each of them, were under a duty to manage, maintain, operate, adequately staff, adequately equip, and control said vessel M/V TROPICALE and its appurtenances and component parts in a safe and seaworthy manner and condition, and as a common carrier.

17. Plaintiffs, 153 of whom are residents of the State of California; 19 of whom are residents of the State of Washington; 10 of whom are residents of Canada; 11 of whom are residents of the State of Oregon; 6 of whom are residents of the State of Ohio; 8 of whom are residents of the State of New York; 1 of whom is a resident of the State of Hawaii; 2 of whom are residents of the State of Montana; 5 of whom are residents of the State of Illinois; 6 of whom are residents of the State of Maine; 2 of whom are residents of the State of Nevada; 1 of whom is a resident of the State of Minnesota; 2 of whom are residents of the State of Pennsylvania; 3 of whom are residents of the State of Wisconsin; 2 of whom are residents of the State of Nebraska; 1 of whom is a resident of the State of Massachusetts; 2 of whom are residents of the State of Arizona; 2 of whom are residents of the State of New Mexico; and 2 of whom are residents of the State of Tennessee, were persons who embarked the vessel M/V TROPICALE in the Port of Los Angeles and who were aboard said vessel M/V TROPICALE as paying passengers on a cruise which originated from said Port of Los Angeles on or about January 17, 1988 and which returned to said port on or about January 24, 1988. Plaintiffs were not given the opportunity to, and did not, read the terms and conditions on the printed tickets issued by defendant CARNIVAL CRUISE LINES, INC. in connection with said cruise voyage until after plaintiffs had paid in full for said tickets. On said cruise voyage said vessel travelled within and beyond the territorial waters of the State of California.

18. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, all of the officers and crew of the vessel M/V TROPICALE were in the employ of defendants CARNIVAL CRUISE LINES, INC., a corporation; and DOES 1 to 10, inclusive, and

each of them, and were acting within the purpose, scope and authority of said agency and employment.

19. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, the vessel M/V TROPICALE was engaged in commercial activities at the Port of Los Angeles, in California territorial waters, and on the high seas, which activities included the carrying of paying passengers.

FIRST CAUSE OF ACTION
AS AND AGAINST ALL DEFENDANTS
(General Negligence)

20. Plaintiffs, and each of them, reallege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 19, inclusive, of the General Allegations above, as though set forth in full.

21. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants CARNIVAL CRUISE LINES, INC., a corporation; and DOES 1 to 10, inclusive, and each of them, negligently owned, leased, chartered, managed, operated, supervised, maintained, equipped, staffed, and otherwise controlled the vessel M/V TROPICALE, including but not limited to acting and failing to act in the following ways:

(a) Said defendants, and each of them, knew or should have known, from weather reports, meteorological services and/or public news broadcasts, at or before the time of the departure of the vessel M/V TROPICALE from the Port of Los Angeles on or before January 17, 1988, of an imminent, violent and safety threatening storm at sea, and despite said knowledge, defendants, and each of them, negligently and recklessly placed the lives and safety of

all passengers aboard the M/V TROPICALE, including plaintiffs herein, in grave jeopardy by departing from the Port of Los Angeles on or about January 17, 1988, rather than delaying departure in order to further determine the direction and intensity of the imminent storm;

(b) Said defendants, and each of them, despite the aforedescribed knowledge of the imminent storm, negligently and recklessly placed the lives and safety of all passengers aboard the vessel M/V TROPICALE, including plaintiffs herein, in grave jeopardy by departing from the Port of Los Angeles on or about January 17, 1988 on the theory that said defendants, and each of them, could somehow avoid, outrun, and/or battle the violent storm while at sea, even though defendants, and each of them, acted and failed to act so as to reasonably ascertain the full nature, duration, and direction of said storm;

(c) Said defendants, and each of them, had a duty to maintain a seaworthy vessel, yet failed to properly maintain, repair, inspect and otherwise control the vessel M/V TROPICALE and its appurtenances and component parts prior to and at the time of the aforedescribed untimely departure on or about January 17, 1988, and failed to assure the vessel's seaworthiness;

(d) Said defendants, and each of them, had a duty to provide a safe vessel, yet failed to properly and adequately equip the vessel M/V TROPICALE with safety equipment, including but not limited to life jackets and/or life vests for all the passengers; said defendants failed to properly and adequately distribute what safety equipment was aboard the vessel to the passengers aboard, including plaintiffs herein.

(e) Said defendants, and each of them, had a duty to disclose, advise and warn the passengers of the M/V TROPICALE, prior to departure, of their knowledge of the imminent, violent storm and the risks associated therewith, and give the passengers, including plaintiffs herein, the option to decide not to proceed on the voyage into the storm; despite said duty, defendants, and each of them, failed to so disclose, advise and warn the passengers, including plaintiffs herein;

(f) Said defendants, and each of them, had a duty to disclose, advise and warn the passengers of the M/V TROPICALE, following departure, of their knowledge of the imminent violent storm at sea, and the risks associated therewith, which disclosure, warning, and advisement should have included safety instructions and directions, and should have been accompanied by the providing of life jackets and/or other safety equipment and instructions on the use thereof; despite said duty, defendants failed to give the passengers, including plaintiffs herein, any disclosure, advisement, warning or safety instruction in advance of the vessel's encounter with the safety threatening storm;

(g) Said defendants, and each of them, had a duty to the passengers of the vessel M/V TROPICALE, including plaintiffs herein, to fully disclose all material knowledge regarding the duration, direction, and intensity of the storm and all facts regarding the condition of the vessel and the safety implications of improperly functioning equipment, once the vessel encountered the storm, and had a further duty at the time to provide adequate safety instructions and directions commensurate with the danger, and to

provide the passengers with life jackets and/or other safety equipment and instructions on the use thereof; despite said duties, defendants, and each of them, failed to so disclose, instruct, direct or provide safety equipment and instructions;

(h) Said defendants, and each of them, had a continuing duty to communicate with the passengers, including plaintiffs herein, once out to sea, concerning the details of the storm and what precautions could and should be taken at any given time in order to minimize the risk of injury, anxiety and discomfort; which duty said defendants, and each of them, breached by failing to properly and adequately disclose, advise, warn and equip the passengers, including plaintiffs herein, as aforedescribed;

(i) Said defendants, and each of them, had a duty to properly staff the vessel, yet failed to staff the vessel M/V TROPICALE with a crew sufficiently and properly trained to handle and control the vessel in a safe manner in an emergency situation and failed to staff said vessel with a crew properly trained to handle and meet the safety needs of the passengers, including plaintiffs herein.

22. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants TODD PACIFIC SHIPYARDS, INC., a corporation; and DOES 11 to 40, inclusive, and each of them, acted and failed to act, and negligently and carelessly constructed, built, rebuilt, modified, serviced, repaired, inspected, installed, fabricated, assembled, tested, warranted and otherwise performed work on the vessel M/V TROPICALE, and its component parts, including but not limited to the port engine and port stabilizer, thereby causing said

vessel to be unseaworthy, unsafe, and unable to withstand the rigors of a strom at sea.

23. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants DOES 61 to 70, inclusive, and each of them, acted and failed to act, and negligently and recklessly failed to provide adequate weather reports and other meteorological services in that, among other things, said defendants had a duty to advise operators of vessels that they should not attempt to proceed into the subject imminent and violent storm due to its apparent significant magnitude, duration, and safety threatening intensity, yet said defendants failed to do so.

24. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants DOES 71 to 90, inclusive, and each of them, had a duty to properly survey and inspect the vessel M/V TROPICALE, and said defendants acted and failed to act, and negligently and carelessly failed to properly survey and inspect the vessel M/V TROPICALE, and its component parts, for purposes of ascertaining value, insurability, structural strength and/or safety, thereby causing, permitting and allowing said vessel, and its component parts, to be maintained in an unsafe and inadequate condition while serving as a common carrier transporting paying passengers.

25. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants, DOES 91 to 110, inclusive, and each of them, had a duty to ensure that only seaworthy and safe vessels carrying paying passengers left the port facilities, and said defendants acted and failed to act and negligently managed, operated, owned, leased, or otherwise controlled the port and departure facilities at the Port of Los Angeles by

failing to properly inspect the vessel M/V TROPICALE prior to departure to ensure that it was properly equipped with safety equipment for its passengers, including plaintiffs herein; and by failing to properly inspect said vessel to ensure that the vessel and its component parts were in a seaworthy condition, thereby causing, permitting, and allowing the vessel M/V TROPICALE to depart from said defendants' facilities, while carrying paying passengers, in an unsafe condition.

26. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants, DOES 111 to 120, inclusive, and each of them, acted and failed to act and negligently provided tug boat services and assistance to the vessel M/V TROPICALE as it undertook to depart from the Port of Los Angeles on or about January 17, 1988, in that, among other things, the vessel, M/V TROPICALE was caused to and did hit the dock as it was being assisted leaving the Port.

27. Defendants CARNIVAL CRUISE LINES, INC., a corporation; TODD PACIFIC SHIPYARD, INC., a corporation; and DOES 1 to 120, inclusive, and each of them knew, or in the exercise of reasonable care should have known, that unless reasonable and proper inspections were made, unsafe, unseaworthy and defective conditions could exist on the vessel and its component parts, which would endanger the safety of the passengers, including plaintiffs herein, aboard the vessell M/V TROPICALE; further, said defendants, and each of them, knew, or in the exercise of reasonable care should have known, that unless adequate and reasonable communications regarding safety precautions to be taken aboard the vessel were given to the passengers, the voyage presented an extreme and unavoidable risk of danger to the passengers, including plaintiffs herein. Plaintiffs, and each of them, allege

that defendants, and each of them, negligently failed to inspect so as to provide a seaworthy and safe vessel and negligently failed to take reasonable precautions to prevent foreseeable grave risks of harm to the passengers of the vessel M/V TROPICALE.

28. During the voyage of the M/V TROPICALE from on or about January 17, 1988 to January 24, 1988, among other things, the vessel's lights went out; windows were broken; the port engine and the port stabilizer did not function properly; equipment aboard the vessel tipped over; passengers, including plaintiffs herein, were propelled through the air; were caused to fall; were struck by flying objects and sliding furniture; and were caused to believe that the vessel was about to capsize.

29. As a direct and proximate result of the aforedescribed negligence of defendants CARNIVAL CRUISE LINES, INC., a corporation, TODD PACIFIC SHIPYARD, INC., a corporation; and DOES 1 to 120, inclusive, and each of them, during the voyage of the vessel M/V TROPICALE, from on or about January 17, 1988 to January 24, 1988, plaintiffs, and each of them, while using and occupying the vessel in a manner that was reasonably foreseeable, were hurt and injured in their health, strength, and activity, sustained injuries to their bodies and shock and injuries to their nervous systems and persons, all of which said injuries have caused and continue to cause plaintiffs, and each of them, great mental, physical, and nervous and emotional pain, anguish and suffering; and plaintiffs, and each of them, are informed and believe and thereon allege that said injuries may result in some permanent disability to each plaintiff, all to each plaintiff's general damage.

30. As a direct and proximate result of said negligence of defendants, and each of them, plaintiffs were required

to, and did, incur medical and incidental expenses for physicians and surgeons to examine, treat and care for plaintiffs, and each of them, the exact amount of which is unknown to plaintiffs, and plaintiffs will ask leave of Court to amend this pleading when the same has been ascertained by each of them.

31. As a further direct and proximate result of said negligence of defendants, and each of them, plaintiffs were prevented from attending to their usual occupations, and plaintiffs are informed and believe and thereon allege that they will be thereby prevented from attending to said usual occupations for periods in the future, the exact amount of which is unknown to plaintiffs at this time, and plaintiffs will ask leave of Court to amend this pleading when the same has been ascertained.

SECOND CAUSE OF ACTION AS AN AGAINST DEFENDANTS CARNIVAL CRUISE LINES, INC., a Corporation, and DOES 1 to 10, Inclusive. (Negligent Infliction of Emotional Distress)

32. Plaintiffs, and each of them, reallege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 19, inclusive, of the General Allegations, and paragraphs 21 (and all subparts), and 23 through 31, inclusive, of the First Cause of Action above, as though set forth in full.

33. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants, CARNIVAL CRUISE LINES, INC., a corporation, and DOES 1 to 10, inclusive, and each of them, although aware of their duty to provide a safe, adequately equipped and seaworthy vessel and of their duty to fully and adequately disclose, warn and advise plaintiffs regarding the imminent violent storm, and the risks associated

therewith, both before departure and during the voyage, negligently failed to provide a safe and seaworthy vessel and negligently failed to so communicate with the passengers of the vessel M/V TROPICALE, including plaintiffs herein; defendants failed to take adequate safety precautions to minimize the foreseeable risk of grave harm to plaintiffs herein; and defendants, by failing to disclose known facts about the presence of the storm at sea prior to departure, deprived plaintiffs of the option to decide not to proceed on the voyage into the violent storm in the first place.

34. At all times mentioned herein, said defendants, in the exercise of reasonable care knew, or should have known, that their aforedescribed failure to provide a seaworthy vessel, failure to properly communicate with the passengers, failure to take necessary safety precautions, and deliberate decision to depart on the subject voyage on the theory that they could somehow avoid, outrun and/or battle the imminent, violent and safety threatening storm even though they did not know the full nature, duration, and direction of said storm, would likely cause plaintiffs herein to suffer severe frustration, feelings of helplessness, fear for their lives and safety, anxiety, and mental and emotional anguish and distress.

35. As a direct and proximate result of the aforedescribed wrongful, reckless, and oppressive conduct of said defendants, and each of them, in conscious disregard of plaintiffs' safety, plaintiffs, and each of them, have suffered severe anxiety, mental anguish, mortification, humiliation, degradation, worry and severe emotional distress, all to their damage in an amount to be proved at the time of trial.

THIRD CAUSE OF ACTION AS AND AGAINST DEFENDANTS TODD PACIFIC SHIPYARDS, INC., a corporation; and DOES 11 to 60, Inclusive. (Strict Products Liability)

36. Plaintiffs, and each of them, reallege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 19, inclusive, of the General Allegations, and paragraphs 27 through 31, inclusive, of the First Cause of Action above, as though set forth in full.

37. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants TODD PACIFIC SHIPYARD, INC., a corporation; and DOES 11 to 60, inclusive, and each of them, manufactured, designed, leased, distributed, advertised, marketed, warranted, fabricated, serviced, inspected, constructed, bought, built, rebuilt, modified, repaired, offered for sale and sold the subject vessel M/V TROPICALE, and each and every component part thereon, including but not limited to, the port engine and the port stabilizer, which contained design and manufacturing defects rendering the vessel, and its component parts, safety defective, unstable, structurally unsound and incapable of withstanding the rigors of a storm at sea; and which did proximately cause personal injuries to passengers, including plaintiffs herein, aboard the vessel while being used and occupied in a reasonably foreseeable manner.

38. Said defendants, and each of them, knew that said vessel and its component parts would be used and occupied by persons such as plaintiffs herein without prior inspection for defects.

39. As a direct and proximate result of the aforedescribed conduct of said defendants, and the defective condition of the vessel M/V TROPICALE and its component parts, plaintiffs have suffered personal injuries and damages as alleged in paragraphs 29, 30, and 31 of the First Cause of Action above, which allegations are incorporated herein by reference as though set forth in full.

FOURTH CAUSE OF ACTION AS AND AGAINST DEFENDANTS TODD PACIFIC SHIPYARD, INC., a Corporation; and DOES 11 to 60, Inclusive.
(Negligence)

40. Plaintiffs, and each of them, reallege and incorporate herein by reference each and every allegation contained in paragraphs 1 through 19, inclusive, of the General Allegations, and paragraphs 27 through 31, inclusive, of the First Cause of Action above, as though set forth in full.

41. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants TODD PACIFIC SHIPYARD, INC., a corporation; and DOES 11 to 60, inclusive, and each of them, negligently and carelessly designed, manufactured, inspected, marketed, installed, modified, constructed, built, rebuilt, fabricated, repaired, bought, offered for sale, sold, distributed, maintained, services, tested, warranted, leased, and supplied the vessel M/V TROPICALE, and each and every component part thereof, including but not limited to the port engine and the port stabilizer, thereby causing said vessel to be unsafe, unseaworthy, structurally unsound, and incapable of withstanding the rigors of a storm at sea.

42. Said negligent conduct of said defendants, and each of them, caused personal injuries and damages to

passengers, including plaintiffs herein, aboard the vessel M/V TROPICALE while being used and occupied in a reasonably foreseeable manner.

43. As a direct and proximate result of said negligent conduct of said defendants, and the defective condition of the vessel M/V TROPICALE and its component parts, plaintiffs have suffered personal injuries and damages as alleged in paragraphs 29, 30, and 31 of the First Cause of Action, which allegations are incorporated herein by reference as though set forth in full.

FIFTH CAUSE OF ACTION AS AND AGAINST DEFENDANTS TODD PACIFIC SHIPYARDS, INC., a Corporation; and DOES 11 to 60, Inclusive.
(Breach of Warranty)

44. Plaintiffs, and each of them, reallege and incorporate by reference each and every allegation contained in paragraphs 1 through 19, inclusive, of the General Allegations, and paragraphs 27 through 31, of the First Cause of Action above, as though set forth in full.

45. Plaintiffs are informed and believe and thereon allege that at all times mentioned herein, defendants TODD PACIFIC SHIPYARDS, INC., a corporation; and DOES 11 to 60, inclusive, and each of them, expressly and impliedly warranted to plaintiffs, passengers of the vessel M/V TROPICALE, and the general public that said vessel, and each and every component part thereof, was reasonably fit for its intended use without endangering human life or limb during its operation; and that such vessel was of merchantable quality; and that the vessel and its component parts were properly and safely designed and constructed. Plaintiffs are informed and believe and thereon allege that prior to January 17, 1988, the said vessel and its component parts were acquired,

obtained, bought, purchased, put into service and used in reliance upon the aforesaid warranties and representations of defendants, and each of them.

46. Said defendants, and each of them, breached the above-described express and implied warranties in that said vessel M/V TROPICALE, and its component parts, were defective, which defects permitted and/or caused plaintiffs to suffer severe personal injuries and damages while being used and occupied in a manner that was reasonably foreseeable.

47. As a direct and proximate result of the above-described breaches of warranties by said defendants, and each of them, plaintiffs suffered severe and permanent personal injuries and damages as alleged in paragraphs 29, 30 and 31 of the First Cause of Action, which allegations are incorporated herein by reference as though set forth in full.

WHEREFORE, plaintiffs, and each of them, pray for judgment against all defendants, and each of them, as follows:

1. General damages according to proof;

2. Medical and related expenses according to proof;

3. Loss of earnings and earning capacity according to proof;

4. Economic losses according to proof, including but not limited to the out of pocket expenses incurred as passengers on the subject cruise voyage;

5. Costs of suit incurred; and

6. Such other and further relief as the Court deems just and proper.

Dated: June 6, 1989

SILVER, MCWILLIAMS, STOLPMAN
MANDEL & KATZMAN

By: JOEL KRISSMAN
Attorneys for Plaintiffs

ORDER

It is hereby ordered that PETER BUSSE and DONNA BUSSE be appointed Guardians ad Litem for STEVE BUSSE and TRISH BUSSE, pursuant to the petition.

DATED:

_____

JUDGE OF THE SUPERIOR COURT

ORDER

It is hereby ordered that GEORGE CHOW and ROBIN CHOW be appointed Guardians ad Litem for CHRISTOPHER GEORGE CHOW and JAIMEE ROCHELLE CHOW, pursuant to the petition.

DATED:

_____

JUDGE OF THE SUPERIOR COURT

ORDER

It is hereby ordered that CLIFFORD DALTON and DONNA DALTON be appointed Guardians ad Litem for JASON DALTON, pursuant to the petition.

DATED:

JUDGE OF THE SUPERIOR COURT

ORDER

It is hereby ordered that DAVID GOLCHEHREH and SUZANNE GOLCHEHREH be appointed Guardians ad Litem for LEILA GOLCHEHREH and LAWDAN GOLCHEHREH, pursuant to the petition.

DATED: Jan. 11, 1989

JUDGE OF THE SUPERIOR COURT

DECLARATION OF DONNA SILVER

[Filed by Respondents Mildred Williams et al. with the California Superior Court on January 31, 1990]

I, DONNA SILVER, hereby declare as follows:

1. I am an attorney at law duly licensed to practice before all courts of this State. I am a partner in the law firm of Silver, McWilliams, Stolpman, Mandel, Katzman & Krissman, attorneys of record for plaintiffs herein. I am the attorney responsible for the handling of this case. The facts set forth herein are personally known to me, and if called upon to testify, I could and would competently testify as follows:

2. In the accompanying Request for Judicial Notice, plaintiffs have requested that this Court take Judicial Notice of Opinions and Orders which are part of the record in the matter of *Shute v. Carnival Cruise Lines* (9th Cir. 1988) 863 F.2d 1473, withdrawn 872 F.2d 930. Therein, the Court of Appeals for the Ninth Circuit held that the Court had personal jurisdiction over CARNIVAL and the Court of Appeals refused to enforce the identical forum selection clause in a cruise ticket for a voyage aboard the same vessel, M/V TROPICALE, departing from the returning to the Port of Los Angeles. The Court of Appeals held the clause to be unreasonable, not freely bargained for, and unenforceable as a matter of public policy. In April, 1989, the United States Court of Appeals for the Ninth Circuit issued an Order Certifying State Law Question to the Washington Supreme Court pursuant to RCW 2.60.020 and withdrew its Opinion pending decision by the Supreme Court of Washington. As demonstrated in the Court of Appeal's Order Certifying State Law Question and in the subsequent Opinion of the Washington Supreme Court, dated December 7, 1989, (appearing at 113 Wn. 2d 763), issued pursuant to said

Certification, the issue considered was whether Washington's long-arm statute established personal jurisdiction over CARNIVAL. The question certified did not involve the Ninth Circuit Court of Appeal's reasoning or holding with regard to the forum selection clause.

3. In its December 7, 1989 Opinion, the Washington Supreme Court answered the jurisdiction question affirmatively, finding personal jurisdiction over CARNIVAL. The Court of Appeals for the Ninth Circuit is now expected to reinstate its earlier Opinion (863 F.2d 1473). On January 7, 1990, this declarant was advised by the Opinions Clerk for the United States Court of Appeals for the Ninth Circuit that it would be at least ninety (90) days before the Ninth Circuit panel acts upon this matter.

4. The evidence in this case is that of the 238 plaintiffs, close to two-thirds of them (153) are California residents. Of the remaining 85 plaintiffs, close to one-half (38) are residents of Western states, including Oregon, Washington, Nevada, Arizona, New Mexico and Montana. The remaining 47 plaintiffs are from various Midwest and East coast states, Canada and Hawaii. Not a single plaintiff is a resident of Florida.

5. The evidence is that not a single plaintiff herein claims to have contemplated having to travel to Florida for any reason connected with this cruise when he or she *purchased* a ticket for the cruise. Not a single plaintiff was provided with *pre-booking* material alerting him or her to the existence of the forum selection clause. Only one plaintiff out of 238 claims to have actually been aware of the forum selection clause prior to embarking on the cruise.

6. The evidence is that at least 211 of the 238 plaintiffs herein used travel agents to purchase their tickets. The

tickets were subject to CARNIVAL cancellation charges as follows: a $100 per person charge for cancellation between 45 and 16 days prior to sailing; a fee of $200 per person was assessed for cancellations between 15 and 3 days prior to departure; and cancellations made within 48 hours resulted in no refund. Only two of the plaintiffs herein believe they purchased cancellation insurance, and only several plaintiffs traveling with or as travel agents did not pay in advance for their tickets. The one plaintiff claiming to be aware of the forum selection clause prior to the cruise departure did not have cancellation insurance.

7. The evidence is that at least 62 plaintiffs herein did not receive their tickets at the time promised. Not a single plaintiff herein contends that he or she received a ticket more than five weeks (35 days) prior to departure. Thus, all but a handful of plaintiffs would have been subject to the cancellation charge(s) had they cancelled upon becoming actually aware of the existence of the forum clause upon receipt of their tickets.

8. The evidence is that at least 44 of the plaintiffs herein received their tickets upon *actual embarkation* of the vessel on January 17, 1988. At least five plaintiffs received boarding passes only, never having received a ticket *at all.* At least six other plaintiffs received their tickets on the *day of departure,* four of whom received their tickets two hours before embarkation. At least four plaintiffs received their tickets the day before the cruise. At least 59 plaintiffs received their tickets from two to four days before departure. At least 74 plaintiffs received their tickets 5 to 10 days before the cruise. At least 27 plaintiffs received their tickets 11-14 days prior to departure, and at least ten received them more than two weeks before departure. At least 90 plaintiffs claim to have received CARNIVAL literature along with their tickets,

but none contends that such literature alerted them to the existence of a forum selection clause in his or her ticket.

9. The evidence is that at least 189 plaintiffs received their ticket in some type of travel folder or packet and at least 104 plaintiffs shared a common ticket with one or more traveling companions or family members.

10. The evidence is that at least 30 plaintiffs herein contend that they are *physically unable* to travel to Florida for any purpose due to age and medical problems including, but not limited to, heart problems, pulmonary problems, and M.S. Of the remaining plaintiffs themselves physically able to travel to Florida, at least one-half of them would suffer such hardship and inconvenience that they would not undertake traveling there for any purpose. Such hardship and inconvenience is due to health problems and medically related concerns; the dependence of infants and small children on such plaintiffs for care and supervision; the dependence of retarded, senile or incapacitated family members on such plaintiffs; problems associated with single parenting; and work commitments.

11. The evidence is that at least 145 plaintiffs — well over one-half of all plaintiffs herein — contend that they are financially incapable of pursuing this litigation in Florida. These plaintiffs are unable to afford the cost of travel to Florida for pre-trial or trial purposes due to the fact that many survive on fixed pensions or retirement incomes; some have limited funds and unemployment problems; others are unable to pay for substitute nursing care for those dependent upon them if they had to travel to Florida; many are unable to pay for the child care that would be required in their absence(s); and many could not afford to pay for lodging for the duration of such trip(s) to Florida.

12. The evidence is that with the exception of several plaintiff(s), of those who are financially able to pursue this matter in Florida, all would experience far less inconvenience and hardship if this matter were to be litigated in California. A large majority of those financially able to travel to Florida would suffer moderate to severe financial hardship as a result of doing so. Some of such plaintiffs fear that they would lose their jobs or ruin their businesses if required to make one or more trips to Florida for any extended period of time.

13. The CARNIVAL vessel M/V TROPICAL sustained damage in a fire in December, 1989 while docked at the port of Los Angeles. It is this declarant's understanding that the vessel thereafter underwent repair while in drydock at the Port of Los Angeles and went back into service earlier this month.

I declare under penalty of perjury that the foregoing is true and correct under the laws of the State of California.

Executed this 29th day of January, 1990, at Wilmington, California.

DONNA SILVER

DONNA SILVER

FURTHER SUPPLEMENTAL DECLARATION OF DONNA SILVER

[Filed by Respondents Mildred Williams et al. with the California Superior Court on April 9, 1990]

I, Donna Silver, hereby declare as follows:

1. I am an attorney duly licensed to practice before the Courts of the State of California, and I am a partner in the law firm of Silver, McWilliams, Stolpman, Mandel, Katzman & Krissman, attorneys of record for plaintiffs herein. I am the attorney responsible for the handling of this case. The facts set forth herein are personally known to me, and if called upon to testify, I could and would competently testify as follows:

2. On or about April 2, 1990, plaintiffs were personally served with Specially Appearing Defendant CARNIVAL CRUISE LINES, INC.'s Objections to Declaration of Donna Silver. It is in response to said document that this Further Supplemental Declaration is being filed with the Court.

3. The factual information set forth in my Declaration attached to plaintiffs' Opposition to CARNIVAL CRUISE LINES, INC.'s Motion to Dismiss Lawsuit Pursuant to Contractual Forum Selection Clause [C.C.P. Section 410.30] and the Memorandum of Points and Authorities in Support Thereof, filed on or about January 31, 1990, came from my personal review of communications between my clients, the plaintiffs herein, and myself.

4. The evidence to which this Declarant refers in paragraphs 4 through 12 of said Declaration is based upon material facts to which my clients could and would competently testify, based upon their personally knowledge thereof. Plaintiffs herein can and will substantiate

the information set forth in said Declaration in paragraphs 4 through 12 at the time they are deposed or in their responses to written discovery.

I declare under penalty of perjury, under the laws of the State of California, that the foregoing is true and correct.

Executed this 9th day of April, 1990 at Wilmington, California.

DONNA SILVER

DONNA SILVER
Declarant